

Supreme Court U.S.
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No.

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IN THE
Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,
Petitioner,
v.
JEREMY FLAX, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Tennessee

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This automotive design-defect case involves the largest judgment ever upheld by the Tennessee Supreme Court. The jury imposed a \$98 million punitive damage award (later reduced to \$13 million) for a minivan seat design that exceeded federal strength requirements and complied with industry standards—despite a statutory presumption that not even compensatory liability is appropriate if a manufacturer complies with governmental safety standards. The case presents the following questions:

1. Whether Tennessee law deprives defendants of “fair notice” and thus violates the Due Process Clause if it permits the imposition of liability for punitive damages without regard to any objective indicators of reasonable conduct—including governmental safety standards, industry custom, and the existence of a genuine debate about what the law requires.
2. Whether the Tennessee Supreme Court’s reinstatement of the \$13 million punitive damage award violates the Due Process Clause, where that court (a) ignored the defendant’s compliance with objective indicia of reasonable conduct; (b) expressly recognized but treated as meaningless the fact that the comparable penalty guidepost mandated by *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), totaled \$125,000 and thus “compel[led]” a much lower amount; and (c) disregarded this Court’s teaching in *State Farm Mutual Auto Insurance Co. v. Campbell*, 538 U.S. 408 (2003), that a 1:1 ratio is generally the constitutional maximum for “substantial” compensatory damage awards, i.e., those over \$1 million.

3. Whether the procedural bar used by the Tennessee Supreme Court to preclude review of the prejudicial impact of nonparty harm evidence and argument under *Philip Morris USA v. Williams*, 549 U.S. 346 (2007), is an independent and adequate state ground for decision.

**PARTIES TO THE PROCEEDING
AND RULE 29.6 STATEMENT**

In addition to the parties named in the caption, Rachel Sparkman was a plaintiff-appellant below and is a respondent in this Court.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Chrysler LLC is indirectly wholly owned by Chrysler Holding LLC, and 80.1% of Chrysler Holding LLC is owned by investment funds or other entities affiliated with Cerberus Capital Management, L.P. The remaining 19.9% of Chrysler Holding LLC is owned by affiliates of Daimler AG.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner DaimlerChrysler Corporation, now Chrysler LLC (“Chrysler”) respectfully submits this petition for a writ of certiorari.¹

OPINIONS BELOW

The opinion of the Tennessee Supreme Court (App. 1a-83a) is not yet published but is electronically reported at 2008 WL 2831225. The opinion of the Tennessee Court of Appeals (App. 84a-153a) is not published but is electronically reported at 2006 WL 3813655. The opinion of the Circuit Court (App. 165a-176a) is not published but is electronically reported at 2005 WL 1768725.

JURISDICTION

The Tennessee Supreme Court denied Petitioner’s Petition for Rehearing on November 12, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part:

No State shall . . . deprive any person of life, liberty, or property, without due process of law

U.S. Const. amend. XIV, § 1.

¹ DaimlerChrysler Corporation became DaimlerChrysler Company LLC, by conversion effective March 31, 2007, and DaimlerChrysler Company LLC became Chrysler LLC, effective July 30, 2007.

STATEMENT

This case demonstrates that the lower courts have not heeded this Court's repeated warnings that punitive damage awards must be consistent with federal due process standards. Those standards govern not only whether a punitive award is excessive, but also whether it is permissible in the first place.

First, in a sharply split decision, and over two insightful dissents, the Tennessee Supreme Court departed from longstanding, traditional common law principles and applied a new rule in this case that directly contravenes the Due Process Clause's prohibition against punishment based on "standards" that are so amorphous and subjective that they neither give "fair notice" to defendants of what the law requires nor prevent the arbitrary infliction of punishment. The Tennessee Supreme Court reinstated the jury's punitive damage verdict, finding that Chrysler acted "recklessly" when it designed a minivan seat, even though it far exceeded federal safety requirements and was consistent with the design used in most vehicles on the road today. It did so despite the fact that Tennessee law, by statute, provides a presumption that no liability—not even compensatory damages—will be imposed if a manufacturer complies with governmental safety standards. *See T.C.A. § 29-28-104.*

While this Court has previously suggested that the due process standards for imposing punitive damage liability are properly subjected to *more* rigorous constitutional scrutiny than the amount of such damages awarded, *see Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 24 n.12 (1991) (contrasting more lenient due process review applicable to the *size* of a penalty with more searching scrutiny used to address imposition of liability in the first instance), this

Court has never squarely addressed this issue. The Court should do so now.

Second, the Tennessee Supreme Court reinstated the \$13 million punitive damage award, on top of a compensatory award of \$2.5 million, despite the fact that it far exceeded the comparable civil or criminal penalties of \$125,000. Certiorari is necessary to resolve the important—and much disputed—question whether and how courts must ensure that punitive damages are in line with comparable penalties. As the Tennessee Supreme Court recognized, the lower courts are “experience[ing] . . . frustrations when attempting to apply the third guidepost, and some have chosen to ignore the third guidepost altogether.” App. 35a. *Compare, e.g., Paracelsus Health Care Corp. v. Willard*, 754 So. 2d 437, 445 (Miss. 1999) (third guidepost unaddressed because no comparable penalty was found), *with FDIC v. Hamilton*, 122 F.3d 854, 862 (10th Cir. 1997) (lack of comparable statutory penalties is a basis for reducing award).

The Tennessee Supreme Court’s decision conflicts with the decisions of other lower courts, including the very circuit in which it is located, that reduce punitive awards that exceed comparable penalties. *See, e.g., Clark v. Chrysler Corp.*, 436 F.3d 594, 607-08 (6th Cir. 2006) (holding that “a \$3 million punitive damage award is excessive in light of comparable civil penalties” where “the maximum civil penalty that could be imposed for a design defect was \$1,000 per vehicle, up to a maximum of \$800,000 for a related series of violations” and reducing award to \$471,258.26). *See also Baldwin v. Alabama*, 472 U.S. 372, 374 (1985) (conflict between decisions of state and federal courts in the same circuit is grounds for certiorari). This critical constitutional issue necessarily arises *each and every* time a court reviews a punitive damage award for excessiveness under the Due Process Clause.

And the court also reinstated the award, despite its greater than 5:1 ratio of compensatory to punitive damages, by ignoring this Court's admonition that a 1:1 ratio is required for "substantial" compensatory damage awards such as the one in this case—another issue on which the lower courts are in complete disarray. *Compare, e.g., Bach v. First Union Nat'l Bank*, 486 F.3d 150, 156-57 (6th Cir. 2007) (holding \$400,000 compensatory damage award was "substantial" and remitting \$2.2 million punitive damage award to \$400,000).

Third, and finally, the court relied on an apparently unprecedeted state-law procedural rule to reject Chrysler's argument that the jury was erroneously allowed to base its decision on alleged harm to nonparties, even though such a rule cannot bar the vindication of federal constitutional rights. Thus, this Court should, at a minimum, hold this case pending its decision in *Philip Morris USA v. Williams*, No. 07-1216 (U.S.).

1. A speeding pick-up truck traveling between 55-70 miles per hour in a 35 mile-per-hour zone rear-ended Respondents' 1998 Dodge Caravan. App. 4a n.2. The severe collision caused the Caravan's front seats to absorb energy and yield rearward, as designed. The front passenger's seat collided with Respondents' son Joshua, who was seated in the middle row of the minivan and suffered a fatal head injury. But the minivan's design successfully protected the other five passengers, who survived without serious injury. Respondents sued Chrysler, seeking compensatory and punitive damages for their son's allegedly wrongful death and for the emotional distress of his mother. App. 5a-6a.

2. At trial, Respondents argued that the minivan's design was defective because the front seats were not sufficiently rigid, while Chrysler's defense

was that its "yielding" design protects the greatest number of people in the greatest number of accidents. Chrysler established, and Respondents conceded, that Chrysler's design exceeded by almost three times the relevant federal safety regulation, 49 C.F.R. § 571.207, which mandates that a seat be strong enough to withstand a rearward movement of 3,300 inch-pounds. App. 140a. And Respondents' expert admitted that the type of seat and strength of the seatback Chrysler used were "in the average of the predominant number of vehicles on the road" in 1998. App. 148a.

The trial court allowed Respondents, over Chrysler's objection, to present evidence of 37 other accidents, 25 of which occurred *after* the sale of their minivan. In addition to contemporaneously objecting, Chrysler also asked the trial court to instruct the jury not to consider the evidence. App. 232a n.19. That request also was denied. App. at 233a n. 20. Respondents' counsel urged the jurors that each bore an "immense burden" to "keep children out of the hospitals and out of the morgues," and that if they did not "drop the hammer" on Chrysler by imposing a multi-million dollar punitive damage award, "[f]or the rest of your lives, you're going to have to ask yourself the question, did I do enough?" App. 267a.

3. Despite the fact that Tennessee law "restrict[s] the awarding of punitive damages to cases involving only the most egregious of wrongs," *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992), and federal guidelines and industry standards demonstrate that Chrysler's design was not objectively unreasonable, the trial court allowed the punitive damage claim to go to the jury. The jury found that Chrysler acted "recklessly" in designing the Caravan. App. 162a.

After apportioning half of the fault to the other driver, the jury held Chrysler liable for \$3.75 million in total compensatory damages for wrongful death and negligent infliction of emotional distress, and \$98 million in punitive damages, resulting in a ratio of approximately 26:1. The trial court concluded that the jury's punitive damage award was unconstitutionally excessive, and reduced it to \$20 million. App. 6a-7a.

4. The Court of Appeals unanimously reversed the *entire* punitive damage award, holding that Respondents failed to prove by clear and convincing evidence that Chrysler acted intentionally or recklessly. The Court discussed, at length, Chrysler's compliance with federal regulatory standards, and the fact that Chrysler's seatback design was consistent with common wisdom in the industry. App. 140a-142a. It held that Chrysler's adherence to "industry customs and standards" is "relevant when determining whether [its] conduct is reckless," and that Chrysler's compliance with all federal regulatory standards "weighs heavily . . . against a clear and convincing finding of recklessness." App. 149a, 142a. Regarding the admission of evidence of at least 25 dissimilar accidents, the Court of Appeals held that it was error for the trial court not to instruct the jury that it could not consider these accidents when imposing punitive damages. App. 143a.

5. The Tennessee Supreme Court granted review and, in a split decision, affirmed the Court of Appeal's denial of Respondents' claim for negligent infliction of emotional distress, thus reducing the compensatory award to \$2.5 million, but reinstated the bulk of the punitive damage award—\$13,367,345—for wrongful death. The court reinstated the award because it found sufficient evidence to support the jury's finding of recklessness, despite the fact that Chrysler undisputedly complied with federal regula-

tions and was therefore "entitled . . . to a rebuttable presumption that its product was not unreasonably dangerous" under Tennessee law. App. 27a (citing T.C.A. § 29-28-104). The court rejected without specifically addressing Chrysler's argument that imposing punitive damage liability under these circumstances violated the Due Process Clause. App. 27a-28a, 212a-214a.

The court attempted to analyze the constitutionality of the size of the award under the three guideposts set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996): (1) "reprehensibility of the defendant's conduct"; (2) "ratio between the punitive damage award and the actual harm suffered by the plaintiff"; and (3) a comparison of "the punitive damage award to civil or criminal penalties that could be imposed for similar conduct." App. 29a. It held that the award was permissible under the first and second guideposts, even though it recognized that "[t]here is . . . some doubt as to the propriety of [the ratio of the punitive damage award to the actual harm suffered by the plaintiff] of 1 to 5.35 because the United States Supreme Court has suggested that a ratio of more than 1 to 4 approaches the outer limits of constitutionality," and "[t]he Court has also suggested that a ratio of 1 to 1 may be all that is permissible in cases where compensatory damages are 'substantial.'" App. 32a-33a.

In addition, because the maximum comparable penalty under Tennessee law is \$125,000, the court noted that "the result recommended by the third guidepost is dramatically at odds with the result suggested by the first two." App. 35a. But the court admitted that it was "unsure how to reconcile the third guidepost." App. 36a (emphasis added). Thus, while recognizing that *Gore*'s third guidepost "seems to compel" a different conclusion, the court nonetheless ignored this and held that the punitive damage

award did not offend due process. App. 36a. In so doing, the court noted the confusion regarding the third guidepost and observed that other “courts have experienced similar frustrations when attempting to apply the third guidepost, and *some have chosen to ignore the third guidepost altogether.*” App. 35a (emphasis added). Rather than follow this Court’s decisions in *Gore* and *State Farm*, and other courts that faithfully apply them by remitting punitive damage awards that exceed comparable penalties, the court followed those courts that “have chosen to ignore the third guidepost altogether” and reinstated the full \$13,367,345 punitive damage award. App. 36a.

While the Tennessee Supreme Court held that the trial court’s admission of evidence of 25 post-sale incidents was erroneous, it concluded that it was harmless. Chrysler argued that Respondents “repeatedly invited the jury” to punish Chrysler for harm caused to “third parties not before the Court,” and that the trial court erred in not instructing the jury to ignore the improper evidence and argument. App. 216a. The Tennessee Supreme Court mentioned only the latter argument, and did not even address the unconstitutionality of being punished for alleged harm to *nonparties*, which Chrysler raised at every stage of the litigation. App. 37a; App. 203a-205a, 214a-220a, 238a-243a, 254a-264a. The court focused exclusively on the fact that Chrysler did not raise a specifically instructional issue in the Court of Appeal, and thus apparently determined that this Court’s clear prohibition on punishing defendants based on harm to nonparties was supposedly limited to the *jury instruction* context.

Two of the five Justices dissented from the court’s reinstatement of the punitive award. Justice Koch emphasized the need for the appellate court to “engage in an independent, *de novo* evaluation of the three ‘guideposts’ for punitive damages first required

in [*Gore*.]” App. 57a. He explained that “this case is neither close nor difficult,” because Respondents “failed to prove by clear and convincing evidence that [Chrysler] acted so recklessly with regard to the design, construction, and marketing of the 1998 Dodge Caravan.” App. 57a-58a. Justice Clark also dissented from the reinstatement of the punitive damage liability finding, stating that the erroneous introduction of the post-sale incidents required a new trial on punitive damages. App. 71a.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED TO CLARIFY HOW THE DUE PROCESS “FAIR NOTICE” PRINCIPLE APPLIES TO STANDARDS FOR DETERMINING PUNITIVE DAMAGE LIABILITY

By approving punishment for conduct that complied with every objective indicator of what the law required, the Tennessee Supreme Court dramatically deviated from traditional common law punitive damage standards, which have historically sanctioned punishment only for conduct that was objectively unreasonable. In the process, the Tennessee Supreme Court’s adoption of a wholly subjective and ad hoc “standard” flatly contravenes the “elementary notions of fairness” and “fair notice . . . of the conduct that will subject [one] to punishment” that are at the core of this Court’s due process jurisprudence. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) (quoting *Gore*, 517 U.S. at 574).

Although *State Farm* and *Gore* focused on the failure to provide fair notice of the severity of the punishment that could be imposed, the right to fair notice of the *conduct* that can give rise to punishment in the first instance has an even longer pedigree and is even more strictly enforced. As the Court

put it in *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), “a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.” *Id.* at 703 (quotation omitted).

1. “[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see also City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (due process requires “the kind of notice that will enable ordinary people to understand what conduct [a law] prohibits”). Laws must therefore provide explicit standards for those who apply them. A law without such standards “impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” *Grayned*, 408 U.S. at 108-09; *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983) (law unconstitutionally vague if it fails to “establish minimal guidelines to govern law enforcement” and confers upon “policemen, prosecutors, and juries” “a standardless sweep . . . to pursue their personal predilections”).

In short, a “statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.” *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (citations omitted).

2. Just last Term, this Court explained that, historically, whether conduct could be found to be “reck-

less" and therefore punishable was based on objective standards. *See Safeco Ins. Co. of Am. v. Burr*, 127 S. Ct. 2201, 2215-17 (2007). "It is this high risk of harm, *objectively assessed*, that is the essence of recklessness at common law." *Id.* at 2215 (emphasis added) (citing W. Page Keeton, et al., *PROSSER AND KEETON ON THE LAW OF TORTS* § 34, p. 213 (5th ed. 1984)). Although the Court "disagree[d]" with the *Safeco* defendant's analysis of what the law required, because the defendant's interpretation of its legal duties, "albeit erroneous, was not objectively unreasonable," the Court held that the defendant could not, as a matter of law, be deemed to have acted "willfully" or with "reckless disregard." *Safeco*, 127 S. Ct. at 2215-17. "Where, as here, the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation, it would defy history and current thinking to treat a defendant who merely adopts one such interpretation as a knowing or reckless violator." *Id.* at 2216 n.20.

In *Safeco*, the Court analogized the traditional common law definition of punishable "recklessness" to the law of qualified immunity, where the relevant inquiry is "whether an action was reasonable in light of legal rules that were 'clearly established' at the time." *Id.* at 2216 (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)). Under this analysis, if the defendant's conduct is reasonably debatable, this does not permit—contrary to the Tennessee Supreme Court's conclusion—a jury to overlook compliance with objective indicia of reasonable conduct, but rather requires judgment as a matter of law. "[I]f officers of reasonable competence could disagree on the matter at issue, immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). And in *United States v. Lanier*, 520 U.S. 259 (1997), this Court employed terms strikingly similar to those of its punitive damages cases in explaining that the qualified

immunity test for public officers is “simply the adaptation of the fair warning standard to give officials . . . the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes.” *Id.* at 270-71 (emphasis added).

3. This Court has applied due process principles to prohibit radical departures from common-law protections on arbitrary punitive damage awards. For example, in *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994), the Court held that a state’s “abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause.” *Id.* at 430. “Traditional practice provides a touchstone for constitutional analysis,” and “[w]hen the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process.” *Id.*; see also *id.* at 436 (Scalia, J., concurring) (“The depravation of property without observing (or providing a reasonable substitute for) an important traditional procedure for enforcing state-prescribed limits upon such deprivation violates the Due Process Clause.”).

Historically, therefore, defendants have been able to rely on objective standards when ordering their conduct so as to avoid punitive damages. Indeed, numerous courts have held that compliance with objective indicators of reasonable conduct, such as industry custom and federal standards, and the existence of a reasonable disagreement over what the law entails, precludes punitive damages.²

2 Industry custom and standards: See, e.g., *Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496, 510 (8th Cir. 1993) (“Compliance with industry standard and custom serves to negate

4. As enunciated by the Tennessee Supreme Court in this case, the Tennessee standard for "recklessness" is a clear break from this traditional common-law practice. The Tennessee Supreme Court agreed that Chrysler was "in compliance with federal regulations and custom within [the] industry," and therefore "entitled to a rebuttable presumption that its product was not unreasonably dangerous." See App 27a (citing T.C.A. § 29-28-104). Nonetheless, the court found Chrysler's conduct to be sufficiently "reckless[]" to warrant punitive damages. App. 27a. The court pointed to no objective indication of any recklessness on Chrysler's part. Instead, it simply held that the *jury's* finding that Chrysler's conduct was reckless was sufficient to overcome all *objective* indicators of reasonableness.

Without this common-law protection, manufacturers such as Chrysler are left without objectively verifiable standards for determining whether a product's design can give rise to punitive damages. The lack of fair notice is exacerbated here by the fact that Tennessee law simultaneously provides a presumption that no liability—not even compensatory

[Footnote continued from previous page]

conscious disregard and to show that the defendant acted with a nonculpable state of mind"). **Federal safety standards:** See, e.g., *Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1059 (11th Cir. 1994) (granting judgment on punitive damages where, *inter alia*, "the record demonstrates that [the manufacturer] complied with all requisite Federal Motor Vehicle Safety Standards"); *Prosser and Keeton*, *supra*, § 36, at p. 233 n.41 ("In most contexts . . . compliance with a statutory standard should bar liability for punitive damages."). **Reasonable disagreement:** See, e.g., *Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1317 (5th Cir. 1995) (vacating punitive award when, *inter alia*, "there is a genuine dispute in the scientific community" regarding reasonableness of design).

damages—will be imposed on manufacturers who comply with government safety regulations. *See* T.C.A. § 29-28-104. The Tennessee standard for punitive damages thus authorizes individual lay juries to make an after-the-fact policy decision as to a complex product design and override the legislature's determination that compliance with governmental safety standards is presumed to be reasonable, and its application is necessarily unpredictable. As one commentator has observed, “[t]he very notion of how much design safety is enough . . . involves a morass of conceptual, political, and practical issues on which juries, courts, commentators, and legislatures strongly disagree” and “[t]here is therefore a vast defect ‘no man’s land’ where a manufacturer has no idea whether it is on the right or wrong side of the law.” David G. Owen, *Problems In Assessing Punitive Damages against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 37 (1982).

This means that Chrysler and other manufacturers “must necessarily guess at its meaning” and hope that the juries and courts will agree with them. *Connally*, 269 U.S. at 391. In fact, under the Tennessee Supreme Court’s ruling, Chrysler could be severely punished simply because a single jury concludes that a single company employee believed the design created too much risk, even though all of the other employees, including engineers and company executives, other manufacturers, and the federal government disagreed. This ruling “violates the first essential of due process,” *id.*, and conflicts with many decisions of this Court and other courts.

5. This question is important and recurring and deserves this Court’s attention. This Court has repeatedly “admonished that ‘punitive damages pose an acute danger of arbitrary deprivation of property,’” *State Farm*, 538 U.S. at 417 (citation omitted), and expressed “concerns over the imprecise manner

in which punitive damages systems are administered.” *Id.* The Court also has recognized that “[v]ague instructions . . . do little to aid the decision-maker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory.” *Id.* at 418; *see also* *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan, J., joined by Marshall, J., concurring) (warning of the due process dangers that arise when juries are told “little more than . . . to do what they think is best” and are thus “left largely to themselves in making this important, and potentially devastating, decision”); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 88 (1988) (O’Connor, J., joined by Scalia, J., concurring in part and concurring in the judgment) (noting that a court’s failure to give the jury proper standards for imposing punitive damages “appears inconsistent with due process”).

Allowing a jury to disregard the considered judgment of federal regulators and comparable conduct by other manufacturers inevitably results in *ex post* judgments based on hindsight rather than reasonable determinations about the particular design at issue. *See Carroll v. Otis Elevator Co.*, 896 F.2d 210, 215-16 (7th Cir. 1990) (Easterbrook, J., concurring) (“The *ex post* perspective of litigation exerts a hydraulic force that distorts judgment. . . . [N]o matter how conscientious jurors may be, there is a bias in the system. *Ex post* claims are overvalued and technical arguments discounted in the process of litigation. . . . And the claims of crippled neighbors receive more weight than do potential injuries to be felt by passengers (and stockholders) in other states.”); Reid Hastie et al., *Looking Backward in Punitive Judgments: 20-20 Vision?*, in Cass R. Sunstein et al., *PUNITIVE DAMAGES: HOW JURIES DECIDE* 96, 108 (2002) (“hindsight bias is almost inevitable when ju-

rors make punitive damages decisions"). Indeed, if manufacturers can be punished for selling products that reasonable people could conclude are not defective, the only way they can modify their conduct to avoid punishment is to stop selling all products that might be subject to criticism by a plaintiff's expert. *See United States v. Powell*, 423 U.S. 87, 93 (1975) (explaining why prohibition against charging an "unreasonable" price for sugar was unconstitutionally vague: "Engaged in a lawful business which Congress had in no way sought to proscribe, [the defendant] could not have charged any price with the confidence that it would not later be found unreasonable.") (emphasis omitted).

Product design cases thus pose a particularly high risk that juries will "use their verdicts to express biases against big businesses." *State Farm*, 538 U.S. at 417 (citation omitted). This Court should grant review and make clear that due process forbids such arbitrary punishment.

II. REVIEW IS NECESSARY TO RESOLVE THE LOWER COURTS' CONFUSION REGARDING APPLICATION OF THE DUE PROCESS GUIDEPOSTS

The Tennessee Supreme Court's reinstatement of a grossly and unconstitutionally excessive punitive damage award reflects not only its erroneous dismissal of all objective indicia of reasonable conduct, but also the extensive confusion in lower courts regarding the application of the due process guideposts this Court first enunciated in *Gore*. The Tennessee court's reprehensibility analysis incorrectly applied the first guidepost by ignoring the objective factors indicating that Chrysler's conduct lay, at most, at the lower end of the reprehensibility spectrum. App. 31a-32a. Perhaps even more critically, the

Tennessee Supreme Court treated the “comparable penalty” guidepost as virtually irrelevant *because* the court expressly recognized that its application would have required that the jury’s award be substantially reduced, and “[w]e are unfortunately left with little guidance as to how to resolve this discrepancy.” App. 35a. In addition, the court declined to find that the \$2.5 million compensatory damage award required a 1:1 ratio because, it said, “the United States Supreme Court has made no effort to demonstrate when damages are ‘substantial.’” App. 33a.

The confusion expressed frankly by the Tennessee Supreme Court is widespread throughout the state and federal courts, and amply warrants review.

A. The Lower Courts Are Split Regarding The “Comparable Penalty” Guidepost

1. This Court has set forth three factors for gauging the constitutional propriety of the size of a punitive damage award: “(1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.” *State Farm*, 538 U.S. at 418 (citing *Gore*, 517 U.S. at 575). See also *Gore*, 517 U.S. at 583 (the Court has also looked to “criminal penalties that could be imposed”).

The third, or comparable penalty, guidepost provides a particularly important check on excessive and arbitrary awards by offering an objective referent that reflects deference to legislative judgments concerning the appropriate size of monetary penalties in analogous circumstances. Comparable penal-

ties are a critically important guidepost because they provide fair notice to defendants of the potential punishment. As a result, “in determining whether an award of punitive damages is excessive[, courts] should ‘accord “substantial deference” to legislative judgments concerning appropriate sanctions for the conduct at issue.’” *Gore*, 517 U.S. at 583 (quoting *Browning-Ferris*, 492 U.S. at 301 (O’Connor, J., concurring in part and dissenting in part)). This is the very purpose of the third due process guidepost.

In each of this Court’s cases involving excessive punitive damage awards, it has looked to the comparable-penalty guidepost and reduced awards that are not comparable. In *Gore*, where “[t]he maximum civil penalty authorized by the Alabama Legislature for a violation of its Deceptive Trade Practices Act is \$2,000,” the Court held that the “\$2 million economic sanction imposed on BMW is substantially greater than the statutory fines available in Alabama and elsewhere for similar malfeasance.” 517 U.S. at 584. In *State Farm*, the Court found it of constitutional significance that the \$10,000 comparable civil sanction was “dwarfed by the \$145 million punitive damages award.” 538 U.S. at 428. The Court also noted that “[p]unitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award.” *Id.*

2. The Tennessee Supreme Court expressed its uncertainty and confusion on how to apply this guidepost, and it is clear that it would not have upheld the punitive damage award below but for its misinterpretation of the third guidepost. The court correctly recognized that “[a] reviewing court engaged in determining whether an award of punitive damages is excessive should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue.” App. 29a (in-

ternal quotations and citations omitted). The court acknowledged that “[t]hese legislative judgments are relevant because they provide defendants with notice of the severity of the penalty that may be imposed upon them.” App. 29a-30a. It then identified “[t]he statute that most closely expresses the Tennessee General Assembly’s judgment concerning the wrongfulness of [Chrysler]’s conduct”: the reckless homicide statute, which limited fines to \$125,000. App. 33a-34a (citing T.C.A. §§ 39-13-215, 40-35-111(c)(4)).

But the court noted a tension between its analysis of the first two guideposts and the result dictated by the third guidepost—a tension it found no principled way to resolve. Under the first two guideposts, it believed that the \$13 million punitive damage award was proper because, in the court’s view, the conduct was sufficiently reprehensible, and the more than 5:1 ratio was acceptable. App. 33a. Yet, under the third guidepost, “\$125,000 would be the maximum punitive damage award that could be imposed in this case. . . . because [Chrysler] never had notice that it could be held liable for an amount greater than \$125,000.” App. 34a-35a.

While the court noted that it was “inclined to give the first two guideposts considerably more weight,” App. 36a, it clearly gave the third guidepost *no* weight. The Court candidly expressed its confusion regarding this Court’s precedents, admitting that it was “*unsure* how to reconcile the third guidepost with the other two,” and noting that it was “unfortunately left with *little guidance* as to how to resolve this discrepancy because both *Gore* and *Campbell* are cases in which all of the guideposts suggest the same result.” App. 35a (emphases added). It observed that “[o]ther courts have experienced similar frustrations when attempting to apply the third guidepost, and some have chosen to ignore the third guidepost altogether.” App. 35a.

As a result, the court analyzed the award under the first and second guideposts, and ignored the third, even while recognizing that the third guidepost would “compel a dramatically different conclusion.” App. 33a. Thus, although Chrysler arguably had notice of at most a maximum penalty of \$125,000, the court upheld the imposition of a multi-million dollar judgment—the largest judgment it has upheld to date.

3. The Tennessee Supreme Court’s confusion regarding application of the comparable penalty guidepost in punitive damage excessiveness review is not unique.³ To the contrary, it is widespread, and courts are greatly divided on the issue, producing at least five interpretations.

a. Some courts correctly apply Gore’s third guidepost to reduce punitive damages to bring them in line with legislative penalties. In *Clark*, the Sixth Circuit drastically reduced a \$3 million punitive damage award as “excessive in light of comparable civil penalties.” 436 F.3d at 607. “At the time of the truck’s design and manufacture, the maximum civil penalty that could be imposed for a design defect was \$1,000 per vehicle, up to a maximum of \$800,000 for a related series of violations. The \$3 million award here is significantly larger than those figures.” *Id.* at

³ See, e.g., Steven L. Chanenson & John Y. Gotanda, *The Foggy Road for Evaluating Punitive Damages: Lifting the Haze from the BMW/State Farm Guideposts*, 37 U. MICH. J.L. REFORM 441, 472 (2004) (“[B]oth state and federal courts have grappled with applying the third guidepost with little uniform success.”); Victor E. Schwartz, et al., *Selective Due Process: The United States Supreme Court Has Said that Punitive Damages Awards Must be Reviewed for Excessiveness, but Many Courts are Failing to Follow the Letter and Spirit of the Law*, 82 OR. L. REV. 33, 51 (2003) (“Many appellate courts have disregarded and misunderstood the third guidepost.”).

608 (citation omitted). Accordingly, the court reduced the punitive award to \$471,258.26. *Id.*

In *Lincoln v. Case*, 340 F.3d 283, 294 (5th Cir. 2003), involving violations of the Fair Housing Act, the Fifth Circuit remitted a punitive damage award of \$100,000 to the statutory maximum civil penalty of \$55,000. Likewise, in *Fabri v. United Technologies International, Inc.*, 387 F.3d 109, 127 (2d Cir. 2004), the Second Circuit vacated and remanded a punitive damage award where the first two factors were inconclusive but the applicable statutory penalty of \$5,000 favored remittance of the \$500,000 award. The court noted that the civil penalty was “1/100 of the punitive damages awarded.” *Id.* at 126. And in *Bains LLC v. Arco Products Co.*, 405 F.3d 764, 777 (9th Cir. 2005), the Ninth Circuit remitted a \$5 million punitive damages award in a Section 1981 case to between \$300,000 and \$450,000 where the comparable statutory penalty authorized by Congress in Title VII was \$300,000.

b. In stark contrast, many courts, such as the court below, simply ignore the third guidepost or deem it irrelevant or confusing, even in the face of clear, comparable statutory penalties. In *Willow Inn, Inc. v. Public Service Mutual Insurance Co.*, 399 F.3d 224, 237-38 (3d Cir. 2005), the Third Circuit noted that it was “unsure as to how to properly apply” the third guidepost and, despite the fact that the punitive damage award was 30 times as large as the civil penalty, refused to “overturn the punitive damages award on this basis alone.” See also *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998 (9th Cir. 2004) (upholding \$5 million punitive damage award without any mention of the third guidepost); *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219, 1231 (10th Cir. 2000) (upholding substantial punitive damage award although third guidepost “lends credence to a smaller punitive dam-

ages award."); *Harris v. Soley*, 756 A.2d 499 (Maine 2000) (upholding punitive damage award without analysis of third guidepost).

Perhaps most strikingly, even courts *on remand from this Court* have felt free to ignore the third guidepost. For example, in *BMW of North America, Inc. v. Gore*, 701 So. 2d 507, 514 (Ala. 1997), the Alabama Supreme Court deemed the third factor irrelevant, ignoring the comparable statutory penalty of \$2,000, and instead imposing a \$50,000 punitive damage award: "Because the legislature has set the statutory penalty for deceitful conduct at such a low level, there is little basis for comparing it with any meaningful punitive damages award, particularly where the defendant is wealthy and the profit gained from the fraudulent act is substantial." The court explained that because "[i]n [that] case, the maximum statutory penalty does not even remove the profit BMW realized from the sale of the damaged automobile to Gore," "a consideration of the statutory penalty does little to aid in a meaningful review of the excessiveness of the punitive damages award." *Id.* Similarly, in *Campbell v. State Farm Mutual Automobile Insurance Co.*, 98 P.3d 409 (Utah 2004), on remand from this Court, the Utah Supreme Court upheld a punitive damage award 900 times greater than the comparable statutory penalty. *See also Williams v. Aetna Fin. Co.*, 700 N.E. 2d 859, 871 (Oh. 1998) ("[I]t would appear that when one of the guideposts is particularly relevant a lesser reliance on the other guideposts may be justified").

c. In *International Union of Operating Engineers, Local 150 v. Lowe Excavating Co.*, 870 N.E. 2d 303, 323 (Ill. 2006), the Illinois Supreme Court held that the absence of a comparable civil penalty rendered the third guidepost irrelevant. *See also Paracelsus*, 754 So. 2d at 445 (Mississippi Supreme

Court noting absence of comparable statutory penalty given no weight).

But other courts hold that the absence of a clearly comparable statutory penalty dictates the opposite conclusion—that it is a mitigating factor requiring reduction of the punitive damage award. In *Hamilton*, 122 F.3d 854, for example, the Tenth Circuit held that the lack of comparable statutory civil or criminal penalties required reduction of the punitive damage award. And in *Roberie v. VonBokern*, 2006 WL 2454647, at *9 (Ky. Aug. 24, 2006), the Kentucky Supreme Court noted that: “Because we can find no civil penalty for this act, this factor raises more concern than the others.”

d. Some courts have ignored the dollar amount of the applicable penalties and instead refer to them merely as an indication of the seriousness of the offense. For example, in *In re Exxon Valdez*, 490 F.3d 1066, 1094 (9th Cir. 2007), *vacated and remanded on other grounds sub nom. Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008), the Ninth Circuit explained that in its “more recent post-*BMW v. Gore* and *State Farm* cases, [that court has] generally not attempted to quantify legislative penalties,” but has “looked only to whether or not the misconduct was dealt with seriously under state civil or criminal laws.” Thus, the court held that, under the third guidepost, a substantial punitive damage award was warranted because “the matter of spilling oil in navigable water has clearly been taken quite seriously by legislatures.” *Id.* See also *Planned Parenthood v. Am. Coalition of Life Activists*, 422 F.3d 949, 963 (9th Cir. 2005) (examining statutory fines and stating that “[t]hese penalties indicate that Congress believed that substantial sanctions were appropriate to deter those who interfere with clinic operations.”); *Grabski v. Blue Springs Ford Sales, Inc.*, 203 F.3d 1024, 1027 (8th Cir. 2000) (affirming punitive damage

award where “legislative judgments,” including imprisonment, fines, and revocation of license, “weigh heavily in favor of an award of punitive damages”). Likewise, in *Mathias v. Accor Economy Lodging*, 347 F.3d 672, 678 (7th Cir. 2003), the Seventh Circuit upheld a punitive award of \$186,000 where compensatory damages were only \$5,000 because, although the comparable civil penalty was only \$2,500, the defendant’s operating license could be revoked for the conduct at issue. The court reasoned that “the defendant would prefer to pay the punitive damages assessed in this case than lose its license.” *Id.*

e. Some courts have interpreted the third guidepost merely as an amorphous “notice” requirement untethered to the amount of the comparable penalty. In *Zimmerman v. Direct Federal Credit Union*, 262 F.3d 70, 83 (1st Cir. 2001), the First Circuit held that “a reviewing court should search for comparisons solely to determine whether a particular defendant was given fair notice as to the potential liability for particular misconduct, not to determine the acceptable range into which an award might fall.”

Similarly, in *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320 (11th Cir. 1999), the Eleventh Circuit explained that “[t]here may . . . be a lack of adequate notice if the difference between the civil or criminal penalties that were or could have been imposed and the punitive damage award is too great.” *Id.* at 1337 (citing *Gore*, 517 U.S. at 584). The Eleventh Circuit nonetheless upheld a \$4.35 million punitive damage award where compensatory damages were only \$47,000 and comparable civil penalties were \$10,000. *Id.* at 1339.

* * *

The third guidepost is at issue every time a court conducts a constitutional excessiveness review of a

punitive damage award and its interpretation has split the lower courts. If properly applied, it is a crucial part of ensuring that punitive damage awards are kept within constitutional limits. "The . . . problems with the third guidepost are both pervasive and severe," but "[t]he third guidepost can be an integral part of a principled and meaningful guidance system for evaluating punitive damages awards." Chanenson & Gotanda, *supra*, at 477. Moreover, because the amount of comparable penalties is often much lower than the amount of punitive damages imposed by a jury, a proper analysis of the third guidepost will often require courts to decrease punitive damages by millions of dollars. *See, e.g., DiSorbo v. Hoy*, 343 F.3d 172, 188 (2d Cir. 2003) (remitting punitive damage award in Section 1983 action from \$1.275 million to \$75,000 and noting that "[w]hile a year's imprisonment is undoubtedly a substantial punishment, a maximum fine of \$1,000 gives little warning that the action could result in a \$ 1.275 million punitive damages award.").

As long as the widespread confusion regarding this guidepost continues, defendants will be subjected to grossly excessive and unconstitutional punitive damage awards. The Court, therefore, should grant certiorari.

B. The Opinion Below Also Reflects The Lower Courts' Conflicting Decisions On Whether "Substantial" Compensatory Damages Require a 1:1 Ratio

In *State Farm*, this Court held that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425; *see also Exxon Shipping*, 128 S. Ct. at 2634 n.28 ("[A] class recovery of \$500 million is substantial. In this case, then, the

constitutional outer limit may well be 1:1.”). The Court further held that the \$1 million in compensatory damages awarded in that case was “substantial,” and “likely would justify a punitive damages award at or near the amount of compensatory damages.” *State Farm*, 538 U.S. at 429. Despite this clear command, the lower courts have reached wildly differing conclusions on when a compensatory damage award is large enough to require that punitive damages be limited to the amount of compensatory damages.

1. The Tennessee Supreme Court discussed this Court’s holding that “a ratio of 1 to 1 may be all that is permissible in cases where compensatory damages are ‘substantial.’” App. 33a. (citing *State Farm*, 538 U.S. at 425). But it inexplicably did “not believe that a [\$2.5 million compensatory damages] award . . . is so large as to require a ratio of 1 to 1.” App. 33a. It therefore upheld a punitive damage award of over \$13 million—more than five times the amount of compensatory damages. App. 33a.

The Ninth and Eleventh Circuits have done the same. See *Hangarter*, 373 F.3d at 1014-15 (holding \$5 million punitive damage award not excessive even though compensatory damages were \$2.7 million); *Action Marine, Inc. v. Cont'l Carbon Inc.*, 481 F.3d 1302, 1322 & n.24 (11th Cir. 2007) (upholding \$17.5 million punitive award despite compensatory damages and attorneys’ fees of \$3.2 million).⁴ These

⁴ Indeed, a few cases, in both the Ninth and Eleventh Circuits, have even acknowledged that compensatory damages were “substantial,” but nonetheless declined to apply a 1:1 ratio. See, e.g., *Planned Parenthood*, 422 F.3d at 963 (9:1 ratio was appropriate, even though “[m]ost of the compensatory awards are substantial”); *Bogle v. McClure*, 332 F.3d 1347, 1362 (11th Cir. 2003) (noting that \$2.1 million compensatory damage was substantial but allowing 4:1 ratio).

courts have noted the Court's statement in *State Farm*, but nonetheless found it inapplicable, despite the compensatory damages in both cases being far greater than in *State Farm*. *Hangarter*, 373 F.3d at 1014-15 (quoting *State Farm*, but not following it because this Court "decline[d] . . . to impose a bright-line ratio which a punitive damages award cannot exceed"); *Action Marine*, 481 F.3d at 1322 & n.24 (holding the Court's instruction regarding "substantial" compensatory damages was "not binding," and concluding that the facts "compel[led] application of what the Court may *someday* unequivocally endorse as the rare exception" (emphasis added)).

2. These holdings are in direct conflict with other courts that have followed this Court's instruction that punitive damages should be limited to the amount of compensatory damages when the compensatory award is substantial.

The Eighth Circuit has, on multiple occasions, reduced punitive damages to the amount of compensatory damages when the plaintiff was awarded a six- or seven-figure compensatory award. *See, e.g., Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004) (reducing punitive damages to equal \$600,000 compensatory damages).⁵ The law is the same in the Third and Sixth Circuits, which have both expressly adopted the standards in *Williams v. ConAgra*. *See, e.g., Jurinko v. Med. Protective Co.*, 2008 WL 5378011, at *11 (3d Cir. Dec. 24, 2008) (explicitly adopting Sixth and Eighth Circuits' law and holding that \$1.65 million compensatory verdict in bad-faith insurance case was "substantial," and re-

⁵ *See also Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 603 (8th Cir. 2005) (finding that compensatory damage award of approximately \$4 million was sufficiently substantial to justify one-to-one ratio of punitive damages).

quired reduction of \$6.25 million punitive damage verdict to amount equal to compensatory damages); *Bach*, 486 F.3d at 156-57 (holding \$400,000 compensatory damage award was “substantial” and remitting \$2.2 million punitive damages award to \$400,000).⁶

3. Commentators have noted this division in the lower courts’ application of the ratio guidepost, particularly with respect to “substantial” compensatory damage awards. See, e.g., Lauren R. Goldman & Nickolai G. Levin, *State Farm at Three: Lower Courts’ Application of the Ratio Guidepost*, 2 N.Y.U. J. L. & BUS. 509, 513, 534-35, 546 (2006) (“[T]he lower courts have all but ignored State Farm’s recommendation that a reduction of punitive damages to a level at or near compensatory damages might be warranted when the compensatory award is objec-

6 See also *Bridgeport Music, Inc. v. Justin Combs Publ'g*, 507 F.3d 470, 488-89 (6th Cir. 2007) (following *Bach* and holding that “a ratio of closer to 1:1 or 2:1 is all that due process can tolerate” where \$400,000 compensatory damages were “substantial”). District courts in the Second Circuit have followed these courts as well, see, e.g., *Thomas v. iStar Fin., Inc.*, 508 F. Supp. 2d 252, 263 (S.D.N.Y. 2007) (holding that punitive damages should not exceed compensatory damages “because [plaintiff] was awarded a very substantial amount in compensatory damages”), as have several state courts, see, e.g., *Hudgins v. Sw. Airlines, Co.*, 2009 WL 73251, at *15 (Ariz. Ct. App. January 13, 2009); *Jet Source Charter, Inc. v. Doherty*, 148 Cal. App. 4th 1, 10 (2007) (remanding \$26 million punitive award to trial court with instructions to limit the award to amount not exceeding total compensatory damages awarded, \$6.5 million); *Walker v. Farmers Ins. Exch.*, 153 Cal. App. 4th 965, 974 (2007) (affirming remittitur of \$8 million punitive award to \$1.5 million, equal to compensatory damages); *Burns v. Prudential Sec., Inc.*, 857 N.E.2d 621, 652 (Ohio Ct. App. 2006) (reducing punitive award from \$250 million to \$6.8 million where compensatory damages were approximately \$6 million).

tively substantial (e.g., above \$500,000), typically upholding ratios between 1:1 and 4:1 and occasionally even higher in such cases."); *see also* 4 Bus. & Com. Litig. Fed. Cts. § 42:63 (2d ed.) (surveying cases). Although many lower courts have obeyed this Court's injunction that punitive awards rarely should exceed a single-digit multiple of compensatory damages, *see generally* Goldman & Levin, *supra*, at 533-34, few have taken to heart the Court's pronouncement that, when compensatory damages are "substantial," a 1:1 ratio may be the constitutional maximum. *See id.* at 510; 4 Bus. & Com. Litig. Fed. Cts. § 42:63.

Recently, in *Exxon Shipping Co. v. Baker*, this Court further explained the purpose of the rule it announced in *State Farm*. The Court reiterated that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 128 S. Ct. at 2634 n.28 (quoting *State Farm*, 538 U.S. at 425). "The criterion of 'substantial' takes into account the role of punitive damages *to induce legal action* when pure compensation may not be enough to encourage suit." 128 S. Ct. at 2634 n.28 (emphasis added).

* * *

The Tennessee Supreme Court, like the Ninth and Eleventh Circuits, stands in direct conflict both with this Court's holding in *State Farm*, and with several other lower courts that have followed *State Farm*. Multi-million dollar compensatory damage awards are unquestionably sufficient "to induce legal action." *Exxon Shipping*, 128 S. Ct. at 2634 n.28. As a result, exceeding a 1:1 ratio in cases such as this is unjustified. This principle is nonetheless the subject

of much confusion among the lower courts. Review is therefore warranted to reiterate and clarify what counts as "substantial" within this Court's mandate in *State Farm*.

III. AT A MINIMUM, THE COURT SHOULD HOLD THIS CASE PENDING *PHILLIP MORRIS V. WILLIAMS II*

Philip Morris USA v. Williams holds that a defendant cannot be charged with punitive damages based on harm to parties not before the court: "[T]he Constitution's Due Process Clause forbids a state to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties." 549 U.S. at 353. Although harm to nonparties may in some circumstances potentially be relevant to the reprehensibility of a defendant's conduct, "a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." *Id.* at 355.

The trial court in this case admitted evidence of 37 accidents involving nonparties it deemed "similar" to the Respondents' accident, 25 of which occurred after the sale of Respondents' vehicle. Respondents also repeatedly told the jury that if they did not impose a substantial punitive damage award, they would be personally responsible for the deaths of other children and adults. Chrysler objected to this evidence and argument in the trial court, argued in its post-trial motions this warranted a new trial, and made the same argument before the Court of Appeals and the Tennessee Supreme Court. App. 207a, 214a, 226a, 259a. Chrysler also argued that the trial court's failure to instruct the jury not to consider this evidence was error and warranted a new trial,

though it did not clearly raise this as a separate argument before the Court of Appeals. App. 259a.

The Tennessee Supreme Court refused to consider Chrysler's nonparty harm argument, however, because it found that Chrysler did not raise an *instructional error* argument in the Court of Appeals. As Justice Koch noted in dissent, however, this ignored Chrysler's broader argument, clearly grounded in the *Philip Morris* decision, that punitive damages based on harm to nonparties is unconstitutional. App. 62a n.16. There is no question that Chrysler fully preserved this argument.

In finding Chrysler's constitutional challenge "waived," the Tennessee court took an extremely narrow view of the substance of the *Philip Morris* decision, and an exceedingly broad view of Tennessee's procedural bar. The court necessarily concluded *sub silentio* that, under *Philip Morris*, the constitutional issues posed by basing punitive damages on alleged harms to nonparties is exclusively one of jury instructions. But this is incorrect. *Philip Morris* did not reach the instructional issue at all. *See* 549 U.S. at 357-58. The Tennessee Supreme Court fashioned a procedural bar that waived the entire argument based on Chrysler's alleged failure to make a subset of the argument—an exclusively instructional issue—to the Court of Appeals, a rule for which there is no apparent precedent.⁷

⁷ The court cited *Brown v. Crown Equipment Corp.*, 181 S.W.3d 268, 281 n.5 (Tenn. 2005), and *Virginia & Southwestern Railroad Co. v. Sutherland*, 197 S.W. 863, 864 (Tenn. 1917), but in both cases the party failed to raise the issue *at all*. There is no apparent Tennessee authority for the Court's failure to consider an issue that was simply framed differently in the Court of Appeals.

This closely resembles the error the Oregon Supreme Court made on remand in *Williams v. Philip Morris Inc.*, 176 P.3d 1255, 1261-62 (Or. 2008), and review is warranted for the same reasons. The adequacy of a state-law bar to a due process challenge is "itself a federal question," *Douglas v. Alabama*, 380 U.S. 415, 422 (1965), and because the Tennessee Supreme Court's ruling misinterpreted this Court's due process precedents, it was not an independent or adequate ground for the judgment. See *NAACP v. Alabama*, 357 U.S. 449, 455 (1958). Consequently, this Court should, at a minimum, hold this case pending its decision in *Philip Morris USA v. Williams*, No. 07-1216 (U.S.).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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February 10, 2009

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Supreme Court U.S.
FILED

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No.

IN THE

Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,

Petitioner,

v.

JEREMY FLAX, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Tennessee

APPENDIX TO THE
PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

**In the
Supreme Court
of Tennessee
At Nashville**

No. M2005-01768-SC-R11-CV

**JEREMY FLAX et al. v. DAIMLERCHRYSLER
CORPORATION et al.**

**Appeal by Permission from the Court of Appeals,
Middle Section Circuit Court for Davidson County
No. 02C-1288 Hamilton V. Gayden, Jr., Judge**

October 25, 2007 Session Heard at Maryville¹

Filed July 24, 2008

¹ Oral argument was heard in this case in Maryville, Blount County, Tennessee, as part of this Court's S.C.A.L.E.S. (Supreme Court Advancing Legal Education for Students) project.

The plaintiffs filed this products liability case against DaimlerChrysler seeking damages for the wrongful death of their son and for emotional distress suffered by the mother. The plaintiffs also sought punitive damages. We granted review to determine: 1) whether a negligent infliction of emotional distress claim brought simultaneously with a wrongful death claim is a "stand-alone" claim that requires expert medical or scientific proof of a severe emotional injury; 2) whether the evidence presented at trial was sufficient to support an award of punitive damages; 3) whether the punitive damages awarded by the trial court were excessive; and 4) whether the trial court erred by recognizing the plaintiffs' second failure to warn claim. We hold that the simultaneous filing of a wrongful death suit does not prevent a negligent infliction of emotional distress claim from being a "stand-alone" claim. Therefore, negligent infliction of emotional distress claims brought under these circumstances must be supported by expert medical or scientific proof of a severe emotional injury. In addition, we conclude that the punitive damages awarded by the trial court were adequately supported by the evidence and were not excessive. Finally, we hold that the trial court erred by recognizing the plaintiffs' second failure to warn claim but conclude that the error did not prejudice the judicial process or more probably than not affect the jury's verdict. Accordingly, we affirm the Court of Appeals' reversal of the compensatory and punitive damage awards based on the negligent infliction of emotional distress claim and reverse the Court of Appeals' decision to overturn the punitive damage award related to the plaintiffs' wrongful death claim.

**Tenn. R. App. P. 11 Appeal by Permission;
Judgment of the Court of Appeals Affirmed in
Part and reversed in Part**

JANICE M. HHOLDER, J., delivered the opinion of the court, in which WILLIAM M. BARKER, C.J., joined. CORNELIA A. CLARK, J., concurring in part and dissenting in part. GARY R. WADE, J., concurring. WILLIAM C. KOCH, JR., J., concurring in part and dissenting in part.

Alan J. Hamilton, George W. Fryhofer, III, James E. Butler, Jr., and Leigh Martin May, Atlanta, Georgia, and Gail Vaughn Ashworth, Nashville, Tennessee, for the Appellants, Jeremy Flax and Rachel Sparkman.

Dominic Lanza and Theodore J. Boutrous, Jr., Los Angeles, California; James C. Ho, Dallas, Texas; Thomas H. Dupree, Jr., Washington, D.C.; and Joy Day and Lawrence A. Sutter, Franklin, Tennessee, for the Appellee, DaimlerChrysler Corporation.

Louis A. Stockell, Jr., Madison, Tennessee, Pro Se.

Allison Orr Larsen, K. Lee Blalack, II, and Matthew M. Shors, Washington, D.C., for the Amicus Curiae, Alliance of Automobile Manufacturers.

Christopher Landau and Robin S. Conrad, Washington, D.C., and John Randolph Bibb, Jr., Nashville, Tennessee, for the Amicus Curiae, The Chamber of Commerce of the United States of America.

Jonathan M. Hoffman, Portland, Oregon, and Linda J. Hamilton Mowles, Knoxville, Tennessee, for the Amicus Curiae, The Product Liability Advisory Council, Inc.

OPINION

I. FACTS AND PROCEDURAL HISTORY

On June 30, 2001, Rachel Sparkman and her eight-month-old son, Joshua Flax, were passengers in a 1998 Dodge Grand Caravan ("the Caravan") operated by Ms. Sparkman's father, Jim Sparkman. Ms. Sparkman was seated in a captain's chair directly behind the driver's seat. Joshua Flax was restrained in a child safety seat in the captain's chair directly behind the front passenger's seat, which Joe McNeil occupied.

As Mr. Sparkman turned left from a private drive onto a public road, the Caravan was rear-ended by a pickup truck driven by Louis Stockell. According to the testimony of the accident reconstruction experts, the pickup truck was traveling between fifty and fifty-six miles per hour at the time of impact. The Caravan was traveling in the same direction at a speed between ten and fifteen miles per hour. At the moment of the impact, the Caravan experienced a change in velocity of approximately seventeen to twenty-three miles per hour. Accident reconstruction experts for both parties testified that Mr. Sparkman was not responsible for the accident and that the accident would not have occurred if Mr. Stockell had not been driving at an excessive speed.²

² The plaintiffs' expert testified that Mr. Stockell originally was traveling at approximately sixty miles per hour, and the defendant's expert testified that Mr. Stockell was traveling at approximately seventy miles per hour. The posted speed limit on the public road at the time of the accident was thirty-five miles per hour.

Upon impact, the backs of the seats containing Mr. Sparkman, Ms. Sparkman, and Mr. McNeil yielded rearward into a reclining position. Tragically, the front passenger's seatback collapsed far enough to allow the back of Mr. McNeil's head to collide with Joshua Flax's forehead. The collision fractured Joshua Flax's skull and caused severe brain damage. None of the other passengers in the Caravan suffered serious injuries. Experts for both parties acknowledged that Joshua Flax would not have been seriously injured if the seat in front of him had not yielded rearward.

Immediately after the Caravan came to a rest, Ms. Sparkman checked on her son's condition and saw that his forehead had been, in her words, "smashed in." Michael Loftis, one of the first people to arrive at the scene of the accident, testified that he saw Ms. Sparkman outside the vehicle holding Joshua Flax. Because he believed Ms. Sparkman was "kind of hysterical" and could have accidentally caused further injury to Joshua Flax, Mr. Loftis offered to hold the child. Although initially reluctant, Ms. Sparkman agreed to give her son to Mr. Loftis. At this point, Mr. Loftis first observed that Joshua Flax had "a hole in his forehead approximately the size of a golf ball and probably a half inch deep." A short time later, Joshua Flax was transported to the hospital by ambulance. He died of his injuries the next day.

On May 7, 2002, Ms. Sparkman and Joshua Flax's father, Jeremy Flax, filed a complaint against

Mr. Stockell³ and DaimlerChrysler Corporation (“DCC”), the manufacturer of the Caravan. The complaint alleged that the Caravan’s seats are defective and unreasonably dangerous, that DCC failed to warn consumers that the seats pose a danger to children seated behind them, and that DCC is strictly liable under the Tennessee Products Liability Act of 1978. Tenn. Code Ann. §§ 29-28-101 to -108 (2000). The plaintiffs further alleged that the condition of the seats and the failure to warn proximately caused Joshua Flax’s death and caused Ms. Sparkman to suffer severe emotional distress. Finally, the plaintiffs alleged that punitive damages are warranted because DCC acted intentionally and recklessly in manufacturing, marketing, and selling the Caravan.

After a lengthy trial, the jury found that the seats were defective and unreasonably dangerous, that DCC failed to warn the plaintiffs about the dangers of the seats at the time of sale, that DCC failed to warn plaintiffs about the dangers of the seats after the sale, and that DCC acted recklessly such that punitive damages should be imposed. The jury apportioned half of the fault to DCC and the other half to Mr. Stockell. Finally, the jury awarded

³ Mr. Stockell failed to attend his scheduled deposition and failed to respond to DaimlerChrysler’s interrogatories and request for production of documents. As a sanction, Mr. Stockell was prohibited from testifying at trial and from raising a defense against the plaintiffs’ claims. In addition, the trial court instructed the jury that Mr. Stockell was at fault. Mr. Stockell is not a party to this appeal, and neither party has appealed any findings of fact or conclusions of law with respect to Mr. Stockell.

\$5,000,000 to the plaintiffs for the wrongful death of Joshua and \$2,500,000 to Ms. Sparkman individually for negligent infliction of emotional distress ("NIED").

After the second stage of the trial, the jury awarded \$65,500,000 in punitive damages to the plaintiffs for the wrongful death of Joshua Flax and \$32,500,000 in punitive damages to Ms. Sparkman individually for NIED. Following the jury's verdict, the trial court conducted a review of the jury's award of punitive damages as required by Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 902 (Tenn. 1992). In its findings of fact and conclusions of law the trial court concluded that "the jury properly found that Daimler Chrysler [sic] acted recklessly and that punitive damages were warranted." The trial court also concluded that the jury's award of punitive damages was excessive because there was a very large discrepancy between the punitive damages, totaling \$98,000,000, and the compensatory damages for which DCC was liable, totaling \$3,750,000. Accordingly, the trial court reduced the punitive damages to \$20,000,000, a remittitur of \$78,000,000. In its final order, the trial court indicated that the plaintiffs were entitled to \$13,367,345 in punitive damages for the wrongful death of Joshua Flax and that Ms. Sparkman was individually entitled to \$6,632,655 in punitive damages for NIED.

On appeal, the Court of Appeals concluded that Ms. Sparkman's NIED claim was subject to the heightened proof requirements set forth in Camper v. Minor, 915 S.W.2d 437, 446 (Tenn. 1996). The Court of Appeals reversed the jury's award of compensatory and punitive damages related to Ms. Sparkman's NIED claim against DCC because

the plaintiffs did not satisfy the heightened proof requirements for a "stand-alone" NIED claim. In addition, the Court of Appeals concluded that there was not clear and convincing evidence that DCC acted recklessly or intentionally. Accordingly, the Court of Appeals reversed the trial court's award of all remaining punitive damages. Finally, the Court of Appeals affirmed the trial court's award of \$5,000,000 in compensatory damages for the wrongful death of Joshua Flax. The plaintiffs appealed the ruling of the Court of Appeals. We granted review.

II. NEGLIGENT INFILCTION OF EMOTIONAL DISTRESS

We begin our analysis with Ms. Sparkman's NIED claim. Our modern jurisprudence concerning NIED began with Camper. In that case, the plaintiff was operating a cement truck when a vehicle operated by the defendant pulled in front of him. The defendant was killed immediately in the resulting collision. Although the plaintiff suffered only minor physical injuries, he filed an NIED claim alleging that he suffered emotional injuries from viewing the defendant's body immediately after the accident.

We began our analysis in Camper by recognizing that the law governing NIED

is fundamentally concerned with striking a balance between two opposing objectives: first, promoting the underlying purpose of negligence law—that of compensating persons who have sustained emotional injuries attributable to the wrongful conduct of others; and second, avoiding the trivial

or fraudulent claims that have been thought to be inevitable due to the subjective nature of these injuries.

Id. at 440. We then catalogued a variety of approaches used in other jurisdictions to meet these two opposing goals. Some jurisdictions held that a plaintiff could not recover for NIED unless he or she suffered a “physical impact” caused by the defendant’s negligent conduct. Id. Other jurisdictions allowed a plaintiff to recover for NIED if the plaintiff suffered a “physical manifestation” of the emotional injury. Id. at 442. Still other jurisdictions required that the plaintiff be in the “zone of danger” created by the defendant’s negligent conduct. Id.

Prior to our decision in Camper, Tennessee applied a version of the “physical manifestation” rule. Id. at 443; see also Memphis State Ry. Co. v. Bernstein, 194 S.W. 902, 902 (Tenn. 1917). Unfortunately, the “physical manifestation” rule discouraged compensation for some meritorious claims by “ignor[ing] the fact that some valid emotional injuries simply may not be accompanied by a contemporaneous physical injury or have physical consequences.” Camper, 915 S.W.2d at 446. Accordingly, Tennessee courts had “continually found it necessary to deviate from the ‘physical manifestation’ rule by either formally creating exceptions to the rule or by applying the rule in a nonrigorous fashion.” Id. at 445. To increase the fairness, clarity, and predictability of the law governing NIED, we abandoned the “physical manifestation” rule and adopted new requirements designed to distinguish between meritorious and frivolous cases. Id. at 446. Specifically, we held that

a plaintiff who has not suffered a physical injury must demonstrate through expert medical or scientific proof that he or she has suffered a "severe" emotional injury. Id. We held that an emotional injury is "severe" if "a reasonable person, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." Id. (quoting Rodrigues v. State, 472 P.2d 509, 520 (Haw. 1970)). Our holding in Camper therefore balances the goals of compensating victims and avoiding fraudulent claims by: 1) allowing a person with emotional injuries to bring NIED claims regardless of whether he or she has suffered any physical injury, and 2) requiring a higher degree of proof for emotional injuries under these circumstances.

In Ramsey v. Beavers, 931 S.W.2d 527, 530-31 (Tenn. 1996), we reaffirmed the principles set forth in Camper, rejected the argument that the "zone of danger" test could be integrated into our Camper analysis, and held that a plaintiff who saw his mother hit by a car could bring a suit for NIED regardless of whether he was physically injured or placed in immediate danger of being physically injured. Id. We emphasized that to prove his claim the plaintiff was required to present expert medical or scientific evidence that he had suffered a severe emotional injury. Id. at 532. In addition, we held that to recover for emotional injuries sustained as the result of the death or injury of a third party a plaintiff must establish: 1) that he or she was sufficiently near the injury-causing event to allow sensory observation of the event, and 2) that the

injury was, or was reasonably perceived to be, serious or fatal.⁴ Id. at 531.

We further clarified our holding in Camper in Estate of Amos v. Vanderbilt University, 62 S.W.3d 133 (Tenn. 2001). Amos involved a plaintiff who was infected with HIV during a blood transfusion. The plaintiff received no notice of the possibility that she had been exposed to HIV. Years later, the plaintiff gave birth to a daughter who was infected with HIV in utero. After her daughter died of an AIDS-related virus, the plaintiff was tested and learned that she had HIV. The plaintiff and her husband filed suit for wrongful birth, negligence, and NIED.

The defendants in Amos cited Camper and argued that the plaintiff was not entitled to recover for emotional injuries because she had failed to present expert or scientific testimony of serious or severe emotional injury. We rejected this argument and held that “[t]he special proof requirements in Camper are a unique safeguard to ensure the reliability of ‘stand-alone’ negligent infliction of emotional distress claims.” Amos, 62 S.W.3d at 136-37. Because “the risk of fraudulent claims is less . . . in a case in which a claim for emotional injury damages is one of multiple claims for damages[,]” we held that the heightened proof requirements set forth in Camper are inapplicable “[w]hen emotional damages are a ‘parasitic’ consequence of negligent

⁴ Our opinion in Ramsey stated that the closeness of the relationship between the plaintiff and the third party is relevant, but we stopped short of requiring plaintiffs to prove that a close relationship existed. 931 S.W.2d at 531-32; accord Lourcey v. Estate of Scarlett, 146 S.W.3d 48, 54 (Tenn. 2004).

conduct that results in multiple types of damages.” Id. at 137. In other words, we recognized a distinction between traditional negligence claims that include damages for emotional injuries and claims that are based solely on NIED.

The plaintiff in Amos alleged that she had suffered emotional injuries caused by her infection with HIV and by the subsequent infection of her daughter. Because the plaintiff’s claim of emotional damages was not separate from her other claims of negligence, but rather was “parasitic” to those claims, her claim was properly characterized as a negligence claim that included damages for emotional injuries. As her claim was not based solely on NIED, we concluded that the proof requirements of Camper were inapplicable. Id.

With this history in mind, we now turn to the facts of the instant case. At trial, the plaintiffs failed to present expert medical or scientific proof that Ms. Sparkman suffered severe emotional injuries. DCC filed motions for directed verdict and judgment notwithstanding the verdict, arguing that Ms. Sparkman’s NIED claim was invalid because plaintiffs failed to meet the Camper requirements. Plaintiffs argued that the heightened proof requirements of Camper were inapplicable because Ms. Sparkman’s NIED claim was filed with a wrongful death claim and was therefore not a “stand-alone” claim. The trial court agreed with the plaintiffs and upheld the jury’s verdict with respect to Ms. Sparkman’s NIED claim.

On appeal, the plaintiffs continue to argue that the NIED claim is not a “stand-alone” claim because the plaintiffs also brought a wrongful death suit on behalf of Joshua Flax. We disagree. It is well settled

that a wrongful death action is a claim belonging to the decedent, not the decedent's beneficiaries. Ki v. State, 78 S.W.3d 876, 880 (Tenn. 2002); see also Tenn. Code Ann. § 20-5-106 (Supp. 2006). "Although the living beneficiaries of the action may seek a limited recovery for their own losses in addition to those of the decedent, the right of action itself remains one that is 'single, entire[,] and indivisible.'" Kline v. Eyrich, 69 S.W.3d 197, 207 (Tenn. 2002) (alteration in original) (citations omitted) (quoting Wheeler v. Burley, No. 01A01-9701-CV-00006, 1997 WL 528801, at *3 (Tenn. Ct. App. Aug. 27, 1997)). Accordingly, the wrongful death claim in the instant case belongs to Joshua Flax rather than to the plaintiffs.

This case is therefore distinguishable from Amos, a case in which the plaintiff sought to recover for emotional damages parasitic to negligence and wrongful birth claims that were personal to the plaintiff. See Smith v. Gore, 728 S.W.2d 738, 741 (Tenn. 1987) (holding that wrongful birth actions are actions by parents "on their own behalf"). Nothing in our opinion in Amos was intended to allow plaintiffs to avoid the heightened proof requirements of Camper by bringing a separate wrongful death suit on behalf of a decedent. Because Ms. Sparkman's NIED claim is the only claim that is personal to one of the plaintiffs, we must conclude that it is a "stand-alone" claim subject to the requirements of Camper.

Furthermore, this case is not meaningfully distinguishable from our decision in Ramsey, a case in which the plaintiff saw his mother killed when she was hit by a car. We held that to recover for emotional injuries sustained as the result of the death or injury of a third party a plaintiff must

present expert medical or scientific proof of a severe emotional injury and establish proximity to the injury-causing event and severity of the injury to the third party. Ramsey, 931 S.W.2d at 531-32. Like the plaintiff in Ramsey, Ms. Sparkman seeks to recover for emotional injuries sustained as a result of witnessing the death of an immediate family member. That the plaintiffs in this case brought a wrongful death suit is not sufficient to exempt the NIED claim from the requirements set forth in Camper and Ramsey because the filing of a wrongful death suit does nothing to demonstrate the reliability of an NIED claim.

The plaintiffs also argue that the NIED claim is valid because Ms. Sparkman suffered minor physical injuries in the accident but chose not to bring a claim for those injuries. This argument has two flaws. First, the plaintiff in Camper also suffered minor injuries for which he did not file a claim. 915 S.W.2d at 439 (quoting the plaintiff's testimony that he suffered a scrape on his knee in the accident). Clearly, the plaintiff's minor injury in Camper did not prevent us from concluding that heightened proof requirements are necessary for NIED claims. See id. at 446. Second, the emotional injuries alleged by Ms. Sparkman are not parasitic to the minor injuries she sustained in the accident but rather are the result of witnessing the death of her child. Even if Ms. Sparkman had chosen to bring a claim for her minor physical injuries, her NIED claim would remain a "stand-alone" claim because the emotional injuries sustained from witnessing the death of her child are completely unrelated to any physical injuries she may have sustained. Of course, Ms. Sparkman would not have been required to meet the Camper requirements to recover for any mental

and emotional suffering resulting from her own physical injuries. See Overstreet v. Shoney's, Inc., 4 S.W.3d 694, 715 (Tenn. Ct. App. 1999) (holding that damages for pain and suffering in a personal injury case may include a variety of mental and emotional injuries that accompany the physical injury). When a plaintiff suffers a physical injury there is some indication that allegations of emotional and mental injuries resulting from that injury are not fraudulent. See Amos, 62 S.W.3d at 137. On the other hand, having a potential claim for physical injuries does nothing to ensure the reliability of an NIED claim relating to the emotional injuries resulting from witnessing the death or injury of a third party. Accordingly, there is no good reason to relieve Ms. Sparkman of her burden of meeting the Camper requirements.

Finally, the plaintiffs argue that the heightened proof requirements of Camper are unnecessary in this case because the severity of Ms. Sparkman's emotional injuries is obvious. Although it is axiomatic that witnessing the death of one's child is a horrific experience, it is not at all obvious what impact such an event will have on any particular individual. Indeed, we constructed the Camper requirements precisely because emotional injuries are uniquely subjective. 915 S.W.2d at 440; Amos, 62 S.W.3d at 137. Although sympathy for a particular plaintiff may tempt us to hold that certain circumstances "obviously" result in severe emotional injuries, we must also recognize that such a holding would subvert the principles set forth in Camper and would likely lead to the kind of ad hoc decisions that originally made NIED case law unpredictable and incoherent. Furthermore, we do not believe the requirement that a severe emotional injury be

proven by expert medical or scientific evidence is unduly burdensome to those plaintiffs who have suffered legitimate "stand-alone" emotional injuries. Accordingly, we decline to create an exception to the Camper requirements based on the particular circumstances of this case.

Based on the foregoing considerations, we hold that Ms. Sparkman's NIED claim was governed by the heightened proof requirements of Camper. It is uncontested that Ms. Sparkman failed to meet those requirements. We therefore affirm, albeit under slightly different reasoning, the Court of Appeals' reversal of the compensatory and punitive damage awards based on Ms. Sparkman's NIED claim.

III. PUNITIVE DAMAGES

Several issues relating to punitive damages have been hotly contested throughout the trial and appeal of this case. DCC continues to assert three arguments against the validity of the punitive damages awarded for the wrongful death of Joshua Flax. First, DCC argues that punitive damages are not warranted in this case because the evidence was insufficient to support a finding of recklessness. Second, DCC argues that the award of punitive damages is excessive in violation of the due process standards announced by the United States Supreme Court in BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), and State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003). Finally, DCC argues that the trial court violated the due process requirements of Phillip Morris USA v. Williams, ___ U.S. ___, 127 S. Ct. 1057 (2007), by allowing the jury to consider harm to non-parties when determining the amount of punitive damages

to impose against DCC. We address each of these arguments in turn.

a) *Sufficiency of Evidence Supporting Jury's Finding of Recklessness*

DCC argues that the evidence submitted by the plaintiffs was insufficient to support the imposition of punitive damages. A verdict imposing punitive damages must be supported by clear and convincing evidence that the defendant acted intentionally, fraudulently, maliciously, or recklessly. Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 (Tenn. 1992). In Hodges, we held that evidence is clear and convincing when it leaves "no serious or substantial doubt about the correctness of the conclusions drawn." Id. at 901 n.3. We also held that a person acts recklessly when "the person is aware of, but consciously disregards, a substantial and unjustifiable risk of such a nature that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances." Id. at 901. The jury in this case found that there was clear and convincing evidence that DCC's conduct was reckless.

When this Court is called upon to review the reasonableness of a jury's verdict, as we are in this case, we "are limited to determining whether there is material evidence to support the verdict." Id. at 898. In making this determination, we do not re-weigh the evidence. Elec. Power Bd. of Chattanooga v. St. Joseph Valley Structural Steel Corp., 691 S.W.2d 522, 526 (Tenn. 1985). Rather, we are "required to take the strongest legitimate view of all of the evidence in favor of the verdict, to assume the truth of all that tends to support it, allowing all reasonable inferences to sustain the verdict, and to discard all to

the contrary." Id. The jury's verdict must be affirmed if any material evidence supports it. Id. Therefore, our review of this issue is limited to determining whether any material evidence supports the jury's conclusion that there is no serious or substantial doubt that DCC consciously disregarded a known, substantial, and unjustifiable risk to the plaintiffs.

To determine whether there is any material evidence supporting the jury's verdict, we must summarize the evidence presented at trial in some detail. At trial, the plaintiffs sought to prove that DCC had known for over twenty years that its seats were defective and unreasonably dangerous but failed to remedy the problem or warn consumers of the danger. DCC countered by arguing that it designed the seats to yield rearward in rear-end collisions to absorb energy from the collision and protect the occupant of the seat. According to DCC, the Caravan design protects the greatest number of people in the greatest number of potential accidents and using stronger seatbacks would increase the danger to occupants of the seat. To further support its argument that its seat design was reasonably safe, DCC repeatedly noted that its seatbacks were similar to those used by other manufacturers and exceeded the federal regulation governing seatback strength, Federal Motor Vehicle Safety Standard 207 ("FMVSS 207").

As part of their effort to demonstrate that the Caravan's seatbacks posed a substantial and unjustifiable risk, the plaintiffs introduced the testimony of Dr. Saczalski, an expert on seat engineering. Dr. Saczalski testified that the Caravan's seats were defective and unreasonably

dangerous because they posed a threat to children seated behind them. His testimony was based in part on crash testing he conducted in an attempt to recreate the accident underlying this case. During the crash test, Dr. Saczalski used vehicles of the same make and model as those involved in the accident and attempted to account for the weight, speed, and trajectory of each vehicle. The Caravan used in the crash test contained dummies approximating the size and weight of Mr. Sparkman, Mr. McNeil, Ms. Sparkman, and Joshua Flax. Dr. Saczalski replaced the driver's seat of the Caravan with a seat from a 1996 Chrysler Sebring, a DCC vehicle that had seats with backs approximately five times stronger than the seats used in the Caravan. Dr. Saczalski placed the Sebring seat in the crash test vehicle to demonstrate how a stronger seatback would perform under forces equivalent to those suffered by the Caravan in the actual accident.

Consistent with the circumstances of the actual accident, videos of the crash test show that the front passenger's seat yielded rearward allowing the McNeil surrogate's head to impact the head of the Joshua Flax surrogate. The Sebring seat also yielded rearward but to a far lesser degree. Significantly, the Sebring seat did not substantially encroach upon the seating area behind it. Dr. Saczalski concluded from the crash test that Joshua Flax would have survived the accident without serious injury had the Caravan been equipped with seats with backs as strong as those of the Sebring seat. Contrary to DCC's assertion that stronger seatbacks impose greater dangers to their occupants in rear-end collisions, the crash test dummy in the stronger Sebring seat experienced less

head and neck acceleration than the dummy in the Caravan seat.

Dr. Saczalski also testified regarding several other crash tests he performed in which Sebring seats were placed side-by-side with other DCC minivan seats. These tests also demonstrated that DCC minivan seats have the capacity to cause injury to children seated behind them. The test results support the view that Sebring seats do not pose the same threat because they do not encroach upon the passenger space behind them. Furthermore, Dr. Saczalski testified that the dummy-occupants of the stronger Sebring seats tended to experience less acceleration to the head and neck than the dummy-occupants of weaker seats.

The plaintiffs also made a considerable effort to demonstrate that DCC was aware that the Caravan seats were defective and unreasonably dangerous for at least twenty years. The minutes from a DCC Engineer Safety Committee meeting dated December 10, 1980, appear to contain the first acknowledgment that yielding seatbacks could be a potential problem. In the meeting it was noted that the seatbacks had yielded to some degree in every crash test and that "improvements could be made, but would require development costs and a piece penalty would result." The Engineer Safety Committee did not make any recommendation to improve seatback strength because the seats performed as well as those of DCC's competitors, complied with federal requirements, and had not been demonstrated "to be a significant injury producing problem." Videos of crash testing performed by DCC confirm that in rear-impact collisions the seats yielded into the occupant space behind them. In addition, plaintiffs presented

documentation showing that in at least one crash test conducted in 1989 the front seats were braced to prevent the seatbacks from impacting equipment occupying the back seat.

Although the minutes from the 1980 meeting indicate that there was no evidence that the seats were a "significant injury producing problem," DCC soon began to receive new information. According to an employee in DCC's customer relations department, during the mid-1980s, DCC began to receive reports of children injured by yielding seatbacks in rear-end collisions. DCC's records contained documentation of several rear-end collisions in which a yielding seatback caused a child to suffer skull or facial fractures. Other injuries sustained by children seated behind yielding seatbacks were also reported to DCC. In spite of these reports, DCC did not issue any warning to customers and continued to advertise the Caravan as a vehicle specifically designed to protect children.

The most significant testimony regarding DCC's knowledge of the danger presented by the Caravan seats was provided by Paul Sheridan, a former DCC employee. During his employment with DCC, Mr. Sheridan served as the chair of the Minivan Safety Leadership Team ("MSLT"), a committee formed to address safety concerns in DCC's minivans. The committee was comprised of persons from DCC's safety, engineering, marketing, sales, and design departments. One of the many safety issues the MSLT was formed to address was the issue of seatback strength. According to Mr. Sheridan, the MSLT had available to it complaints regarding injuries caused by yielding seatbacks. At a March 16, 1993, committee meeting,

members of the MSLT reached a consensus that it was unacceptable for seats to yield rearward into the passenger space behind them and that the seats were inadequate to protect customers. After the meeting, Mr. Sheridan distributed the minutes of the meeting to various DCC executives. Some time thereafter, Ronald Zarowitz, a member of the MSLT representing DCC's safety office, instructed Mr. Sheridan to retrieve the minutes of the meeting and destroy them. Mr. Zarowitz informed Mr. Sheridan that this order came from Francois Castaing, the head of the engineering department. Mr. Sheridan retrieved the minutes as instructed, but he retained two copies in his office.

After the March 1993 meeting, Mr. Sheridan decided to investigate the seatback issue further. To this end, Mr. Sheridan met with an engineer responsible for seat design and requested the seat design specifications that discussed how the seats were designed to yield. According to Mr. Sheridan, the engineer "didn't know what [he] was asking for" but provided the design specifications of the seats. These specifications did not state that the seats were designed to yield. In fact, Mr. Sheridan testified that he never heard any engineer state that seatbacks were designed to yield rearward as a safety precaution. In September 1994, Mr. Sheridan told his supervisor that he was going to go to regulators with his concerns about the minivan seatbacks. In November 1994, the MSLT was disbanded at the direction of Ted Cunningham, the executive with authority over minivan operations. Mr. Sheridan was fired on December 27, 1994, and the minutes

from the March 1993 MSLT meeting and the seat design specifications were confiscated from his office.⁵

We find little support in the record for Justice Koch's speculation that Mr. Sheridan's testimony "may very well reflect DaimlerChrysler's over-reaction to the Sixty Minutes story and the existence of some internal dissension regarding how best to respond to the concerns about car seat safety raised by the story." In fact, this characterization of Mr. Sheridan's testimony appears to have been rejected by the jury, which heard his testimony and was charged with resolving issues of credibility. Moreover, DCC presented no testimony that the formation of the MSLT was an "over-reaction," and it is clear from Mr. Sheridan's testimony that he believed the MSLT was necessary to address serious safety concerns. DCC's efforts to destroy the recommendations produced by the MSLT are a further indication of DCC's awareness of the seat-back problem and its determination to hide the problem rather than solve it. In our minds, this represents more than "some internal dissension regarding how best to respond to the concerns about car safety."

Justice Koch's efforts to discount Mr. Sheridan's testimony are inconsistent with our standard of review on appeal. The jury apparently accredited much of Mr. Sheridan's testimony, and, as we have stated, we are required to view his testimony in the

⁵ Those documents are not included in the record before us. The plaintiffs allege that the documents were not produced during discovery.

light most favorable to the jury's verdict and assume the truth of his assertions that support the jury's verdict. Elec. Power Bd. of Chattanooga, 691 S.W.2d at 526. We therefore must assume that Mr. Sheridan was truthful when he denied leaking confidential information to Auto World magazine. We must also make the reasonable inference that Mr. Sheridan in fact was fired because he threatened to go to regulators with his safety concerns. In addition, whether Mr. Sheridan has been excluded from testifying in other cases is irrelevant to our review. The trial court denied DCC's motion to exclude Mr. Sheridan's testimony, and DCC has not appealed that aspect of the trial court's ruling. The actions of another court have no impact on our review of the testimony accredited by the jury.

The plaintiffs also sought to demonstrate that compliance with FMVSS 207 was insufficient to make the Caravan seats reasonably safe. A seat engineer employed by DCC testified that FMVSS 207 requires "inadequate seat strength to insure that the seat does not fail when the car is subject to severe rear impact." In addition, Mr. Sheridan testified that members of the MSLT agreed that compliance with FMVSS 207 was insufficient to ensure safety of consumers. Furthermore, both of DCC's experts on seat design agreed that compliance with FMVSS 207 alone is inadequate to protect passengers.

Finally, the plaintiff argued that stronger seatbacks would not result in greater injuries to occupants of the seats. Specifically, the plaintiffs claimed that the Sebring seat, which was approximately five times stronger than the Caravan seat, was a reasonably safe seat. The results of Dr. Saczalski's crash testing provide some evidence

that the Sebring seat offered a reasonable level of protection to its occupants. In addition, one of DCC's experts on seatback engineering agreed that the Sebring seat was a reasonably safe seat.

In summary, the jury's finding that the Caravan seats posed a substantial and unjustifiable risk to consumers was supported by: 1) expert testimony that the seats were defective and unreasonably dangerous; 2) crash tests demonstrating that the yielding seatbacks consistently encroached upon the occupant space behind them; 3) Mr. Sheridan's testimony that safety officials and engineers employed by DCC believed that the Caravan's seats were unacceptably dangerous; and 4) crash test evidence and expert testimony that Joshua Flax would not have been killed had a stronger seat been in place. The jury's finding that DCC consciously disregarded the risks posed by the Caravan seats was supported by: 1) minutes of DCC meetings noting that seats yielded; 2) DCC crash tests demonstrating that seats consistently encroached upon the passenger space behind them; 3) DCC records of injuries caused by yielding seatbacks; and 4) Mr. Sheridan's testimony that executives ignored the MSLT's warning that the seatbacks were unacceptably dangerous. We conclude that this evidence adequately supports the jury's conclusion that there is no serious or substantial doubt that DCC consciously disregarded a known, substantial, and unjustifiable risk to the plaintiffs. The evidence that DCC executives failed to heed the warnings of the MSLT and ordered the destruction of the committee's findings is particularly compelling. Not only did DCC fail to warn customers or redesign its product, DCC hid the evidence and continued to market the Caravan as a vehicle that put safety first.

Because the jury's verdict is supported by clear and convincing material evidence, we must affirm the jury's finding of recklessness. Elec. Power Bd. of Chattanooga, 691 S.W.2d at 526.

DCC's argument that risks associated with the Caravan seats were justified by the need for the seat to absorb energy from the collision and protect seat occupants is of no avail. This argument was presented to the jury, and the jury was apparently unconvinced by it. The jury could have reasonably accredited Mr. Sheridan's testimony that the seats were not intentionally designed to yield as a safety mechanism. The jury also could have reasonably concluded from testimony regarding the Sebring seat that seats need not yield as dramatically as the Caravan seats to protect seat occupants. DCC's argument that there is an ongoing debate regarding the optimum level of seatback strength is also without merit. The jury could have reasonably concluded that such a debate exists and simultaneously found that the Caravan's seats were weak enough to fall outside the range of reasonable debate.

With regard to DCC's proposed justification, Justice Koch fails to give proper deference to the jury's conclusions. He concludes that a "genuine principled debate" concerning the proper seatback strength led DCC to design "the front seats of the minivan to yield in a controlled manner in the event of a rear impact." Whether the seats were designed to yield "in a controlled manner" was contested at trial. The jury, apparently convinced by the accident reconstruction, the expert testimony, DCC's crash tests, and Mr. Sheridan's testimony, concluded that the manner in which the seats yielded was

unreasonably dangerous and that DCC recklessly disregarded the danger to its customers. While Justice Koch may disagree with that conclusion, this Court is not free to reweigh the evidence or second-guess the jury's conclusions when they are supported by material evidence.

We are also unconvinced by DCC's arguments that compliance with federal regulations and custom within an industry should bar the recovery of punitive damages. It is true that compliance with FMVSS 207 entitled DCC to a rebuttable presumption that its product was not unreasonably dangerous. Tenn. Code Ann. § 29-28-104. It is equally true, for the reasons stated above, that the evidence in this case thoroughly rebutted that presumption. Tennessee Code Annotated section 29-28-104 was designed "to give refuge to the manufacturer who is operating in good faith and [in] compliance of what the law requires him to do." Tuggle v. Raymond Corp., 868 S.W.2d 621, 625 (Tenn. Ct. App. 1992) (alteration in original). The statute was not designed to provide immunity from punitive damages to a manufacturer who is aware that compliance with a regulation is insufficient to protect users of the product. While evidence of compliance with government regulations is certainly evidence that a manufacturer was not reckless, it is not dispositive. See O'Gilvie v. Int'l Playtex, Inc., 821 F.2d 1438, 1446 (10th Cir. 1987); Silkwood v. Kerr-McGee Corp., 769 F.2d 1451, 1457-58 (10th Cir. 1985); Dorsey v. Honda Motor Co., 655 F.2d 650, 656 (5th Cir. 1981). To hold otherwise would create an overly inflexible rule that would allow some manufacturers knowingly engaged in reprehensible conduct to escape the imposition of punitive damages.

Similarly, if a manufacturer knows that a common practice in an industry presents a substantial and unjustifiable risk to consumers, then compliance with the common practice is not an absolute bar to the recovery of punitive damages. Cf. Surles ex rel. Johnson v. Greyhound Lines, Inc., 474 F 3d 288, 300-01 (6th Cir. 2007) (applying Tennessee law and concluding that compliance with federal regulations and common industry practices is evidence of the standard of care but does not conclusively establish the standard of care in negligence cases). Evidence that a manufacturer consciously disregarded substantial and unjustifiable risks to the public can, in some rare cases, overcome evidence that the manufacturer's practice was common in the industry. This is such a case. Because the jury could have reasonably concluded from the evidence presented that DCC was aware that compliance with the FMVSS 207 and the industry standard for seat design was insufficient, we hold that punitive damages were not barred in this case.

b) Due Process Concerns and the Excessiveness of the Punitive Damage Award

Having concluded that punitive damages were warranted in this case, we now review whether the size of the punitive damage award is excessive in violation of the due process standards announced by the United States Supreme Court in Gore and Campbell. We begin our analysis of this issue by reviewing the United States Supreme Court's punitive damage jurisprudence.

In Gore, the United States Supreme Court was called upon to determine the constitutionality of a punitive damage award. The Court concluded that

due process requires that "a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." Gore, 517 U.S. at 574. Accordingly, the Court adopted three guideposts for determining whether a defendant has adequate notice of the magnitude of the sanction that may be imposed. The first and most important guidepost is the reprehensibility of the defendant's conduct. Id. at 575. The Court indicated that the presence of violence, deceit, reckless disregard for the safety of others, or repeated misconduct may be aggravating factors that increase the reprehensibility of the defendant's conduct. Id. at 575-76. The second guidepost is the ratio between the punitive damage award and the actual harm suffered by the plaintiff. Id. at 580. Although the Court declined to adopt any strict mathematical formula, it repeated the suggestion from a previous case that "a punitive damages award of 'more than 4 times the amount of compensatory damages' might be 'close to the line' of constitutional impropriety. Id. at 581-82 (quoting Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23-24 (1991)). The final guidepost requires courts to compare the punitive damage award to civil or criminal penalties that could be imposed for similar conduct. "[A] reviewing court engaged in determining whether an award of punitive damages is excessive should 'accord 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue." Id. at 583 (quoting Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part)). These legislative judgments are relevant because they provide defendants with notice of the severity of the

penalty that may be imposed upon them. See id. at 584.

The United States Supreme Court next considered the due process requirements for punitive damages in Campbell. The Court again observed that the reprehensibility of the defendant's conduct is the most important guidepost. Campbell, 538 U.S. at 419. In an effort to provide guidance to lower courts, the Court stated that courts should determine reprehensibility

by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Id. The Court further stated, "The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." Id. With regard to the second guidepost, the Court stated, "[I]n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." Id. at 425. In addition, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." Id. The Court then qualified its previous statement by observing

that “[t]he precise award in any case, of course, must be based upon the facts and circumstances of the defendant’s conduct and the harm to the plaintiff.” Id. Finally, when discussing the third guidepost, the Court held that

[t]he existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action. When used to determine the dollar amount of the award, however, the criminal penalty has less utility. Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof. Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award. Id. at 428.

Unlike the deferential standard of review employed when reviewing a jury’s factual conclusions, we conduct a de novo review of the amount of a punitive damages award to determine whether the award meets due process requirements in light of the three guideposts. Id. at 418.

Having reviewed the applicable United States Supreme Court precedents, we now turn to the application of the principles set forth therein. The evidence in this case clearly demonstrates that DCC’s conduct was reprehensible. Obviously, the harm suffered in this case was physical rather than economic. The death of a child is undoubtedly a

tragic experience that is far more serious than a mere economic loss. Furthermore, as we have summarized above, DCC's conduct evinces a conscious disregard for the safety of others. In addition, DCC deceitfully covered up evidence of the deficiencies of its seat design while simultaneously advertising the Caravan as a vehicle that put children's safety first. Finally, DCC's wrongdoing was not an isolated incident because DCC had knowledge of the danger its seats posed to the public for years and yet continued to sell its vehicles in an unreasonably dangerous condition throughout the State of Tennessee. We therefore conclude that under this first, most important guidepost DCC had fair notice that its conduct could subject it to a severe penalty.

We now turn to the second guidepost, the ratio between the punitive damages and compensatory damages. The trial court in this case remitted the punitive damages for the wrongful death of Joshua Flax to \$13,367,345.⁶ We must compare this punitive damage award to the \$2,500,000 in compensatory damages for which DCC is liable for the wrongful death of Joshua Flax. The ratio between these two awards is 1 to 5.35. This ratio is not clearly impermissible because it does not exceed a single digit ratio. See Campbell, 538 U.S. at 425. There is, however, some doubt as to the propriety of a ratio of 1 to 5.35 because the United States Supreme Court has suggested that a ratio of more

⁶ Having invalidated the trial court's award of compensatory and punitive damages based on NIED, we need only discuss the punitive damages arising out of the wrongful death claim.

than 1 to 4 approaches the outer limits of constitutionality. Id.; Gore, 517 U.S. at 581. The Court has also suggested that a ratio of 1 to 1 may be all that is permissible in cases where compensatory damages are "substantial." See Campbell, 538 U.S. at 425. None of these ratios, however, present "rigid benchmarks," and the United States Supreme Court has thus far declined to adopt any fixed mathematical formula to determine the appropriateness of punitive damages. Id. Instead, the Court has held that "[t]he precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." Id.

In light of the first two guideposts, we believe that a ratio of 1 to 5.35 would be warranted in this case. Although the United States Supreme Court has made no effort to demonstrate when damages are "substantial," we do not believe that an award of \$2,500,000 is so large as to require a ratio of 1 to 1. Furthermore, a punitive damage award of \$13,367,345 is consistent with the concept that the reprehensibility of a defendant's conduct is the most important of the due process guideposts and is justified by DCC's long-term pattern of conduct that resulted in severe injuries to the plaintiffs and showed a conscious disregard for the safety of Tennessee citizens. Accordingly, in light of the first two guideposts we would hold that a punitive damage award approaching the maximum ratio permitted by the due process clause is appropriate.

The third guidepost set forth in Gore seems to compel a dramatically different conclusion. The statute that most closely expresses the Tennessee General Assembly's judgment concerning the

wrongfulness of DCC's conduct is the reckless homicide statute codified at Tennessee Code Annotated section 39-13-215 (2006). According to that statute, reckless homicide is "a reckless killing of another." Tenn. Code Ann. § 39-13-215. The meaning of the word "reckless" as it is used in that statute is identical to the meaning of "reckless" in a punitive damage context. Compare Hodes, 833 S.W.2d at 901, with Tenn. Code Ann. § 39-11-302(c) (2006). Because DCC's reckless conduct resulted in the death of Joshua Flax, reckless homicide is the criminal act most analogous to DCC's conduct.⁷ The maximum statutory punishment for corporations that commit reckless homicide is a fine of \$125,000. Tenn. Code Ann. § 40-35-111(c)(4) (2006).

Pursuant to the holding of the United States Supreme Court, we must accord "substantial deference" to the General Assembly's decision that \$125,000 is an appropriate sanction against corporations guilty of reckless homicide. Gore, 517 U.S. at 583. Furthermore, we must "avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed." Campbell, 538 U.S. at 428. Although the United States Supreme Court has never held that the third guidepost is dispositive, it appears that under this guidepost \$125,000 would be the maximum punitive damage

⁷ We express no opinion concerning whether DCC could actually be prosecuted for reckless homicide under Tennessee Code Annotated section 39-11-404 (2006). It is sufficient that the statutory definition of reckless homicide encompasses the conduct of DCC.

award that could be imposed in this case. Arguably, this is because DCC never had notice that it could be held liable for an amount greater than \$125,000.⁸ Clearly, the result recommended by the third guidepost is dramatically at odds with the result suggested by the first two. We are unfortunately left with little guidance as to how to resolve this discrepancy because both Gore and Campbell are cases in which all of the guideposts suggest the same result. Other courts have experienced similar frustrations when attempting to apply the third guidepost, and some have chosen to ignore the third guidepost altogether. See, e.g., In re Exxon Valdez, 490 F.3d 1066, 1094 (9th 2007) (noting that if the Court of Appeals for the Ninth Circuit mentions the third guidepost at all, it does not review the amounts of legislative penalties but determines “whether or not the misconduct was dealt with seriously under state civil or criminal laws”); Willow Inn, Inc. v Pub. Serv. Mut. Ins. Co., 399 F.3d 224, 237-38 (3d Cir. 2005) (noting the difficulty courts have in applying the third guidepost and declining to overturn a punitive damage award on that basis alone).

⁸ We find this reasoning somewhat peculiar considering that our decision in Hodges clearly set forth both the conditions under which a defendant could be held liable for punitive damages and the factors that would determine the amount of punitive damages available. See Hodges, 833 S.W.2d at 901-02. Although those standards were necessarily imprecise, our decision in that case would appear to be sufficient to provide DCC with notice that consciously disregarding the safety of Tennessee citizens could subject it to a considerably large punitive damage award.

Although we are somewhat unsure how to reconcile the third guidepost with the first two, we are inclined to give the first two guideposts considerably more weight. The United States Supreme Court has held that the first guidepost is the most important and has never stated that the third guidepost is dispositive. Furthermore, we are unaware of any state or federal case that has invalidated a punitive damage award solely because the award was greater than that contemplated by statutory penalties. In addition, the trial court's award in this case is far less drastic than the awards rejected in Gore and Campbell, which were 1,000 and 14,500 times greater, respectively, than the maximum civil or criminal penalty. See Campbell, 538 U.S. at 428; Gore, 517 U.S. at 584. Finally, we do not believe that a punitive damage award of \$125,000 would adequately punish DCC or deter future instances of similar conduct. For these reasons, we conclude that a punitive damage award of \$13,367,345 is constitutionally permissible in this case.

c) *Due Process Concerns and Harm to Non-Parties*

DCC also contends that its right to due process was violated because the jury was allowed to punish DCC for harm suffered by persons who were not parties to the action. In support of this argument, DCC cites the United States Supreme Court's recent decision, Philip Morris. In Philip Morris, the Court held that trial courts must, upon request, provide assurance that juries are not allowed to punish defendants for harm caused to nonparties. Id. at

1065.⁹ In the present case, DCC requested that the jury be instructed that it could not punish DCC for harm suffered by nonparties, but the trial court declined to give this instruction. Unfortunately, DCC did not question the rejection of its proposed jury instruction in the Court of Appeals. DCC now seeks to resurrect this issue before this Court. Litigants who hope to have an issue heard by this Court must first present that issue to the intermediate appellate court. See Brown v. Crown Equip. Corp., 181 S.W.3d 268, 281 n.5 (Tenn. 2005); Va. & Sw. R.R. Co. v. Sutherland, 197 S.W. 863, 864 (Tenn. 1917). Accordingly, we do not reach the issue of whether the trial court erred by failing to instruct the jury not to punish DCC for harm suffered by nonparties.

IV. VALIDITY OF PLAINTIFFS' POST-SALE FAILURE TO WARN CLAIM

In their complaint, the plaintiffs asserted a claim based on DCC's failure to warn consumers that the Caravan's seatbacks posed a danger to children placed behind them. Prior to trial, the plaintiffs filed a trial brief clarifying that they were attempting to bring two separate failure to warn claims. The first

⁹ The Court did attempt to clarify that injuries suffered by nonparties are relevant to demonstrate the reprehensibility of a defendant's conduct. Id. at 1064. As the Court stated, "conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few." Id. at 1065. Upon motion by the parties, trial courts are required to instruct the jury that it may consider harm to nonparties to determine reprehensibility but should not directly punish defendants for harm to nonparties.

claim is a traditional failure to warn claim alleging that DCC failed to provide a warning prior to or at the time the Caravan was sold. Tennessee courts have long held that a manufacturer may be held strictly liable for failing to warn consumers of the dangers of a particular product at the time of sale. Whitehead v. Dycho Co., 775 S.W.2d 593, 596 (Tenn. 1989); Trimble v. Irwin, 441 S.W.2d 818, 821 (Tenn. Ct. App. 1968). The General Assembly has also acknowledged that a failure to warn claim is a valid basis for a product liability action. Tenn. Code Ann. § 29-28-102(6) (2000). Accordingly, the trial court permitted the plaintiffs to proceed with the traditional failure to warn claim, and DCC has not appealed the trial court's ruling on that issue.

The plaintiffs' second failure to warn claim is more problematic. In their trial brief, the plaintiffs asserted that DCC should also be held liable for failing to warn the plaintiffs of the condition of the seatbacks after the Caravan was sold. Plaintiffs argued their second claim is what is commonly referred to as a "post-sale failure to warn" claim,¹⁰ a claim that has not been previously recognized in Tennessee. Irion v. Sun Lighting, Inc., No. M2002-00766-COA-R3-CV, 2004 WL 746823, at *17 (Tenn. Ct. App. Apr. 7, 2004). Under the assumption that their second claim was a post-sale failure to warn claim, the plaintiffs argued that the trial court

¹⁰ For reasons that are explained below, we do not believe plaintiffs' second failure to warn claim is properly characterized as a post-sale failure to warn claim. Accordingly, we refer to their cause of action as the "second failure to warn claim" or the "second claim."

should join the jurisdictions that recognize the post-sale failure to warn claims and adopt the post-sale failure to warn provisions of the Restatement (Third) of Torts. See Restatement (Third) of Torts: Products Liability § 10 (1998). The trial court was persuaded by the plaintiffs' arguments and allowed the plaintiffs to present evidence and argument at trial in support of their second failure to warn claim. At the conclusion of the trial, the jury found the defendants liable on the plaintiffs' second failure to warn claim.

DCC contends that the trial court erred in recognizing the post-sale failure to warn claim. We agree. Although different states apply the doctrine differently, the vast majority of courts recognizing post-sale failure to warn claims agree that a claim arises when the manufacturer or seller becomes aware that a product is defective or unreasonably dangerous after the point of sale and fails to take reasonable steps to warn consumers who purchased the product. See, e.g., Lovick v. Wil-Rich, 588 N.W.2d 688, 693 (Iowa 1999); Patton v. Hutchinson Wil-Rich Mfg. Co., 861 P.2d 1299, 1313 (Kan. 1993); Owens-Illinois, Inc. v. Zenobia, 601 A.2d 633, 645-46 (Md. 1992); Comstock v. Gen. Motors Corp., 99 N.W.2d 627, 634 (Mich. 1959); see also Douglas R. Richmond, Expanding Products Liability: Manufacturers' Post-Sale Duties to Warn, Retrofit and Recall, 36 Idaho L. Rev. 7, 18 (1999). Accordingly, courts apply the traditional failure to warn claim when a manufacturer or seller had knowledge of a defect at the time of sale and apply the post-sale failure to warn claim when a

manufacturer or seller learns of the defect after the time of sale.¹¹ Victor E. Schwartz, The Post-Sale Duty to Warn: Two Unfortunate Forks in the Road to a Reasonable Doctrine, 58 N.Y.U. L. Rev. 892, 893 (1983).

Unlike plaintiffs in post-sale duty to warn cases, the plaintiffs in this case do not allege that DCC discovered problems with the seatbacks after the time of sale. On the contrary, the theory of the plaintiffs' case was that DCC had knowledge that the seats were defective and unreasonably dangerous as early as the 1980s. Furthermore, DCC does not deny that it had knowledge of the performance of its seats at the time of sale but argues that the seats functioned in a non-defective and reasonably safe manner. There is therefore no dispute regarding DCC's knowledge at the time of sale of the Caravan. Although the plaintiffs allege that DCC continued to receive notice that its product was dangerous after the sale, they do not allege that DCC received any new information during this period. Accordingly, this case does not present the facts necessary to allow us to consider the merits of recognizing post-

¹¹ The distinction between the two causes of action is important because the burden of issuing a warning is much greater once the product has left the control of the manufacturer or seller. Restatement (Third) of Torts: Products Liability § 10 cmt. a. Therefore, jurisdictions that allow post-sale failure to warn claims generally consider the difficulty of identifying and communicating with product users when determining whether the manufacturer or seller acted reasonably. See *id.*; *Lovick*, 588 N.W.2d at 695-96. These difficulties are generally not an issue in traditional failure to warn claims.

sale failure to warn claims. Rather, the plaintiffs' allegation that DCC was negligent in failing to warn the plaintiffs after the sale is an attempt to impose liability a second time for what is essentially the same wrongful conduct. If a defendant negligently fails to warn at the time of sale, that defendant does not breach any new duty to the plaintiff by failing to provide a warning the day after the sale. Instead, the defendant merely remains in breach of its initial duty. For these reasons, we conclude that the trial court erred by adopting and applying the post-sale failure to warn claim in this case. We express no opinion, however, as to the merits of recognizing that cause of action in an appropriate case.

DCC claims the trial court's error was prejudicial to DCC in two ways. First, DCC claims that due process concerns are raised by allowing the jury to base its recklessness determination on a previously unrecognized cause of action. Essentially, DCC argues that it did not have notice that it could be punished for failing to issue a warning after the date of sale. See Gore, 517 U.S. at 574 (holding that a defendant is entitled to fair notice of "the conduct that will subject him to punishment"). Although the jury did find DCC liable for the post-sale duty to warn claim, it also found DCC liable on three other grounds—designing, manufacturing, and selling the Caravan with defective seats; designing, manufacturing, and selling the Caravan with unreasonably dangerous seats; and failing to warn the plaintiffs at the time of sale. There was sufficient evidence of recklessness related to these three claims from which a reasonable jury could have determined that punitive damages were warranted. Furthermore, in the second phase of the trial, the trial court instructed the jury that it was not to base

its award of punitive damages on the post-sale failure to warn claim. In spite of this instruction, the jury awarded \$98,000,000 in punitive damages. The jury's belief that the three valid claims warranted such a substantial award is powerful evidence that the decision to impose punitive damages was not based upon the post-sale failure to warn claim. Furthermore, we are similarly unconvinced that the jury based the wrongful death award on the postsale failure to warn claim. Under the circumstances of this case, the three valid claims were sufficient to support a wrongful death award of \$5,000,000. Accordingly, we find this argument to be without merit.

Second, DCC claims that the post-sale duty to warn claim permitted the admission of evidence that otherwise would have been deemed irrelevant. Specifically, DCC argues that the evidence of other similar incidents occurring after the date of sale would not have been admissible. Indeed, the plaintiffs acknowledged at trial and in their response to DCC's Motion for Judgment Notwithstanding the Verdict and New Trial that the other similar incidents were tendered and admitted only to prove that DCC had notice of the condition of the seats. The jury was also instructed that it could consider the other similar incidents only for the purpose of showing that DCC had notice of the seat's condition. In their post-trial motions and responses, the parties appeared to agree that the documents supporting the other similar incidents would have been inadmissible hearsay if offered to prove that the seats were defective or unreasonably dangerous. Clearly incidents that occurred after the date the plaintiffs purchased the Caravan could not have provided DCC with notice that it should provide a warning at the

time the Caravan was sold. It therefore appears that the trial court admitted evidence of the post-sale similar incidents to show notice with respect to the plaintiffs' second failure to warn claim. We agree that there would have been no valid reason to admit the post-sale similar incidents if the trial court had not recognized the plaintiffs' second failure to warn claim. Because we hold that the trial court should not have recognized this claim, the trial court erred in admitting evidence of the twenty-five other similar incidents that occurred after the Caravan was purchased in May 1998.

Our inquiry does not end here. DCC is entitled to reversal of the jury's verdict only if the trial court's error would have "more probably than not affected the judgment or would result in prejudice to the judicial process." Tenn. R. App. P. 36(b); accord Cumulus Broad., Inc. v. Shim, 226 S.W.3d 366, 375 (Tenn. 2007). "The greater the amount of evidence of guilt, the heavier the burden on the defendant to demonstrate that a non-constitutional error involving a substantial right more probably than not affected the outcome of the trial." State v. Rodriguez, ___ S.W.3d ___, ___ (Tenn. 2008).

Although the jury heard evidence of twenty-five post-sale similar incidents, the trial court instructed the jury that it could consider that evidence only for the purpose of determining whether DCC had notice of the condition of the seats. We presume that the jury followed the trial court's instruction and did not consider the other similar incidents for purposes of determining whether the seats were unreasonably dangerous. State v. Williams, 977 S.W.2d 101, 106 (Tenn. 1998). We therefore conclude that the trial court's instruction significantly reduced the danger

of prejudice to DCC. In addition, the trial judge's remittitur of the punitive damages award also limited the danger that the evidentiary error affected the judgment in this case.

Most importantly, there was a wealth of evidence supporting the jury's verdict. There was testimony that DCC had received notice of children injured by yielding seatbacks as early as the mid-1980s. DCC's own crash test videos demonstrated that seatbacks consistently yielded into the passenger space behind them in rear-end collisions. Mr. Sheridan testified that the MSLT informed DCC executives that the seats were dangerous. Finally, the plaintiffs introduced twelve similar incidents that occurred before the date of sale. Of those twelve, three incidents involved a child suffering skull or facial fractures as a result of a yielding seat. Three others involved children suffering other injuries from yielding seatbacks. The jury's verdict is amply supported by this properly admitted evidence. In light of the wealth of evidence supporting the jury's verdict, we conclude that the twenty-five other similar incidents that were improperly admitted were not so significant as to affect the jury's verdict. Accordingly, we conclude that the trial court's decision to admit the post-sale other similar incidents did not prejudice the judicial process or more probably than not affect the judgment.

We are not indifferent to Justice Koch's concerns about the volume of improperly admitted evidence and the potential for prejudice when admitting other similar incidents. As we have stated, however, the proof of DCC's recklessness is so powerful that the jury was probably not affected by the trial court's error. Justice Koch has a very different view of the

evidence in this case, and it is therefore unsurprising that his dissent expresses a greater estimation of the impact of the trial court's error.

V. MISCELLANEOUS RULINGS OF THE TRIAL COURT

DCC also argues that it was prejudiced by various other rulings of the trial court. Specifically, DCC argues that the trial court abused its discretion by admitting the other similar incidents that occurred prior to the sale of the Caravan, excluding accident data proffered by DCC, and failing to grant a new trial as a sanction for the trial court's determination that plaintiffs abused the discovery process. DCC also argues that the absence of a valid ad damnum clause in plaintiffs' complaint should bar any award to the plaintiffs. For the reasons stated by the Court of Appeals, we conclude that each of these arguments is without merit.

VI. CONCLUSION

We hold that Ms. Sparkman's NIED claim is a "stand-alone" claim in spite of the fact that she simultaneously brought a wrongful death claim. Therefore, Ms. Sparkman's NIED claim should have been supported by expert medical or scientific proof of a severe emotional injury. Accordingly, we affirm the Court of Appeals' reversal of the compensatory and punitive damage awards based on Ms. Sparkman's NIED claim. In addition, we conclude that the punitive damages awarded by the trial court were adequately supported by the evidence and were not excessive. Therefore, we reverse the Court of Appeals' decision to overturn the punitive damage award related to the plaintiffs' wrongful death claim. Finally, we hold that the trial court erred by recognizing the plaintiffs' second

failure to warn claim but conclude that the error did not more probably than not affect the judgment or prejudice the judicial process. Costs of this appeal are taxed equally to the appellee, DaimlerChrysler Corporation, and the appellants, Jeremy Flax and Rachel Sparkman, and their sureties for which execution may issue if necessary.

JANICE M. HOLDER, JUSTICE

**In the
Supreme Court
of Tennessee
At Nashville**

No. M2005-01768-SC-R11-CV

**JEREMY FLAX et al. v. DAIMLERCHRYSLER
CORPORATION et al.**

**Appeal by Permission from the Court of Appeals,
Middle Section Circuit Court for Davidson County
No. 02C-1288 Hamilton V. Gayden, Jr. Judge**

October 25, 2007 Session Heard at Maryville¹

Filed July 24, 2008

**WILLIAM C. KOCH, JR., J., concurring in part
and dissenting in part.**

The Court has decided to uphold a judgment for \$18,367,345 in compensatory and punitive damages arising out of the death of an eight-month-old child in a collision between a minivan and a truck. While

¹ Oral argument was heard in this case in Maryville, Blount County, Tennessee, as part of this Court's S.C.A.L.E.S. (Supreme Court Advancing Legal Education for Students) project.

the parents' loss of their child is heart-wrenching and tragic, I cannot concur in affirming the awards of either compensatory or punitive damages against the manufacturer of the minivan in which the child was a passenger. The child's parents are not entitled to \$13,367,345 in punitive damages because they have failed to present clear and convincing evidence that the manufacturer acted recklessly in the design, construction, or marketing of the minivan. They are likewise not entitled to recover \$5,000,000 in compensatory damages because of the erroneous admission of evidence regarding twenty-five "similar incidents" occurring after the date that the minivan was sold. Accordingly, rather than approving the award of \$18,367,345 in compensatory and punitive damages, I would remand the case for a new trial on the issue of compensatory damages only.

I.

In June 2001, Jim and Sandra Sparkman resided in Kingston Springs, Tennessee with their adult daughter, Rachel Sparkman, and Joshua Flax, Rachel Sparkman's eight-month-old son. The Sparkmans owned a 1998 Dodge Caravan minivan manufactured by DaimlerChrysler Corporation ("DaimlerChrysler"). On the morning of June 30, 2001, shortly after Mr. Sparkman turned left onto Old Charlotte Pike from a private driveway, a truck being driven by Louis A. Stockell, Jr. crashed into the rear of the Sparkmans' minivan. Mr. Stockell's truck was traveling between fifty and fifty-five miles per hour despite a thirty-five mile per hour speed limit. The force of the collision propelled the minivan off the roadway, up a small hill, and head-

on into a tree.² The minivan's rear bumper sustained almost two feet of crash damage, and the force of the collision jammed the doors shut.

When the collision occurred, Mr. Sparkman was in the driver's seat, and another adult passenger was in the front passenger's seat. Rachel Sparkman was seated in a captain's chair style seat immediately behind her father, and Joshua Flax was strapped in a forward-facing baby seat in the captain's chair style seat immediately behind the front passenger seat. Two other adults were seated in a third row of seats. None of the adults in the minivan were seriously injured. However, Joshua Flax sustained severe head injuries when the collision caused the back of the seat in front of him to yield backward and to strike him on the head. Joshua Flax died at the hospital the following day.

On May 7, 2002, Rachel Sparkman and Jeremy Flax,³ along with the Sparkmans filed a complaint in the Circuit Court for Davidson County against DaimlerChrysler and Mr. Stockell. Of particular relevance to this appeal, Rachel Sparkman and Jeremy Flax sought to recover compensatory and punitive damages for the wrongful death of Joshua Flax.⁴ For her own part, Rachel Sparkman also

² Mr. Stockell's truck also veered off the road and followed the minivan up the hill. After the minivan struck the tree, Mr. Stockell's truck collided with the rear of the minivan a second time.

³ Jeremy Flax is Joshua Flax's biological father.

⁴ The wrongful death claims included allegations that DaimlerChrysler was negligent in the design, manufacture, and sale of the minivan and that the front seats in the minivan were

sought compensatory and punitive damages for negligent infliction of emotional distress.

The trial before a Davidson County jury began on November 3, 2004. On November 22, 2004, the jury returned a verdict finding that both DaimlerChrysler and Mr. Stockell were fifty percent at fault for Joshua Flax's death and for Ms. Sparkman's emotional injuries. The jury returned a \$5,000,000 verdict on the wrongful death claim and a \$2,500,000 verdict on Ms. Sparkman's negligent infliction of emotional distress claim. The jury also decided that DaimlerChrysler had acted recklessly and, therefore, that DaimlerChrysler could be required to pay punitive damages. The jury retired to deliberate further and, on November 23, 2004, returned a verdict against DaimlerChrysler awarding \$66,500,000 in punitive damages on the wrongful death claim and \$32,500,000 in punitive damages on Ms. Sparkman's negligent infliction of emotional distress claim.

DaimlerChrysler filed the usual post-trial motions challenging both the awards of compensatory damages and the awards of punitive damages. On July 11, 2005, the trial court filed a final order and judgment affirming the compensatory

[Footnote continued from previous page]

defective and unreasonably dangerous. Rachel Sparkman and Jeremy Flax also alleged that DaimlerChrysler had violated its post-sale duty to warn owners about the defective and dangerous seats in the minivan. They also alleged that DaimlerChrysler knew that the seats were dangerous but had recklessly failed either to correct them or to warn the minivan owners of the danger.

damages awards. Exercising its authority under Hodges v. S.C. Toof & Co., 833 S.W.2d 896 (Tenn. 1992), the trial court reduced the punitive damages award on the wrongful death claim from \$66,500,000 to \$13,367,345 and the punitive damages award on Ms. Sparkman's negligent infliction of emotional distress claim from \$32,500,000 to \$6,632,655.

DaimlerChrysler, as well as Ms. Sparkman and Mr. Flax, appealed to the Court of Appeals. Following oral arguments in July 2006, the appellate court filed a lengthy and detailed opinion on December 27, 2006. Flax v. DaimlerChrysler Corp., No. M2005-01768-COA-R3-CV, 2006 WL 3813655 (Tenn. Ct. App. Dec. 27, 2006). The Court of Appeals affirmed the \$5,000,000 award of compensatory damages for the wrongful death of Joshua Flax. However, the court reversed the compensatory and punitive damage awards for Ms. Sparkman's negligent infliction of emotional distress claim because Ms. Sparkman had failed to present expert evidence that she had sustained serious and severe emotional injuries. The appellate court also reversed the \$13,367,345 award for punitive damages for the wrongful death of Joshua Flax after concluding that Rachel Sparkman and Jeremy Flax had failed to present clear and convincing evidence that DaimlerChrysler had acted recklessly.

We granted Rachel Sparkman's and Jeremy Flax's application for permission to appeal to review the Court of Appeals' decision to dismiss Ms. Sparkman's claim for negligent infliction of emotional distress and to reverse the \$13,367,345 award for punitive damages for the wrongful death of Joshua Flax. In accordance with Tenn. R. App. P.

13(a), DaimlerChrysler has also asserted that it is entitled to a new trial on the wrongful death claim.

The Court has now determined that the Court of Appeals properly reversed the awards for compensatory and punitive damages for Ms. Sparkman's negligent infliction of emotional distress claim. The Court has also affirmed the \$5,000,000 award of compensatory damages and has reinstated the \$13,367,345 award of punitive damages for the wrongful death of Joshua Flax. While I concur fully with the reasoning and the result of the Court's disposition of the negligent infliction of emotional distress and post-sale failure to warn claims, I cannot concur with the decision to affirm the awards of compensatory and punitive damages on the wrongful death claims.

II.

THE PUNITIVE DAMAGES AWARD

Punitive damages have been awarded by Tennessee's courts for almost one hundred and seventy years.⁵ Their two-fold purpose is to punish wrongful conduct and to deter others from engaging in similar conduct in the future. Miller v. United Automax, 166 S.W.3d 692, 697 (Tenn. 2005);

⁵ Wilkins v. Gilmore, 21 Tenn. (2 Hum.) 140, 141 (1840). By 1870, punitive damages awards were so well-established, that this Court, despite its strong misgivings, declined to discontinue them. Dougherty v. Shown, 48 Tenn. (1 Heisk.) 302, 305-06 (1870). During this time, punitive damages have been referred to as "exemplary damages," "vindictive damages," and "smart money." Liberty Mut. Ins. Co. v. Stevenson, 212 Tenn. 1, 8, 180, 368 S.W.2d 760, 761 (1963).

Concrete Spaces, Inc. v. Sender, 2 S.W.3d 901, 906-07 (Tenn. 1999). As salutary as these purposes are, the courts have recognized that awards of punitive damages pose an acute danger of arbitrary deprivation of property, Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994), and that they have a devastating potential for harm when imposed indiscriminately, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003) (quoting Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 42 (1991) (O'Connor, J., dissenting)).

Sixteen years ago, this Court, acknowledging the potential difficulties with punitive damages awards, limited the circumstances in which punitive damages could be awarded and prescribed procedures to assure that punitive damages were not arbitrarily and capriciously awarded. Hodges v. S.C. Toof & Co., 833 S.W.2d 896 (Tenn. 1992). We recognized that punitive damages could be a deterrent against “truly reprehensible conduct,” Hodges v. S.C. Toof & Co., 833 S.W.2d at 901, and thus we limited punitive damages awards to circumstances in which the defendant has acted intentionally, fraudulently, maliciously, or recklessly. Hodges v. S.C. Toof & Co., 833 S.W.2d at 901.

At the same time that we circumscribed the circumstances in which punitive damages could be awarded, we prescribed four procedures designed to assure that punitive damages, when warranted, were imposed in only the “most egregious cases” and then, in a manner consistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 8 of the Constitution of Tennessee. See Hodges v. S.C. Toof & Co., 833 S.W.2d at 900-02. These procedures

include: (1) a bifurcated trial,⁶ (2) a heightened burden of proof,⁷ (3) specific instructions,⁸ and (4) independent judicial oversight over punitive damages awards.⁹ This case requires consideration of the plaintiff's heightened burden of proof and the courts' oversight of punitive damages awards.

We decided in Hodges v. S.C. Toof & Company that plaintiffs seeking punitive damages must present "clear and convincing evidence" that the defendant's acts that caused their injury were intentional, fraudulent, malicious, or reckless. Hodges v. S.C. Toof & Co., 833 S.W.2d at 901 & n.3. The clear and convincing evidence standard requires that the truth of the proposition sought to be established by the evidence be highly probable. Teter v. Republic Parking Sys., Inc., 181 S.W.3d 330, 341 (Tenn. 2005). Clear and convincing evidence leaves no serious or substantial doubt about the correctness of the conclusions to be drawn from the evidence. In re Valentine, 79 S.W.3d 539, 546 (Tenn. 2002); Hodges v. S.C. Toof & Co., 833 S.W.2d at 901 n.3. Thus, clear and convincing evidence produces in the fact-finder's mind a firm belief or conviction regarding the truth of the facts sought to be established. In re Tiffany B., 228 S.W.3d 148, 155-56 (Tenn. Ct. App. 2007); Hibdon v. Grabowski, 195 S.W.3d 48, 63 (Tenn. Ct. App. 2005); Wiltcher v. Bradley, 708 S.W.2d 407, 411 (Tenn. Ct. App. 1985).

⁶ Hodges v. S.C. Toof & Co., 833 S.W.2d at 901.

⁷ Hodges v. S.C. Toof & Co., 833 S.W.2d at 901.

⁸ Hodges v. S.C. Toof & Co., 833 S.W.2d at 901-02.

⁹ Hodges v. S.C. Toof & Co., 833 S.W.2d at 902.

Giving juries discretion to award punitive damages creates the potential that juries will use their verdicts to express biases against big businesses, especially ones without a strong local presence. Honda Motor Co. v. Oberg, 512 U.S. at 432. Accordingly, in Hodges v. S.C. Toof & Company, we required the trial courts to review punitive damages awards differently than the way they customarily review jury verdicts and compensatory damages awards. Rather than performing their traditional task as the thirteenth juror, we directed trial courts to "review the award, giving consideration to all matters on which the jury is required to be instructed." Hodges v. S.C. Toof & Co., 833 S.W.2d at 902. We also directed trial courts to "clearly set forth the reasons for decreasing or approving all punitive awards in findings of fact and conclusions of law demonstrating a consideration of all factors on which the jury is instructed." Hodges v. S.C. Toof & Co., 833 S.W.2d at 902.

Because punitive damages awards are different, they also require a different standard of appellate review. This standard of review consists of two steps.

A heightened burden of proof requires a heightened standard of appellate review.¹⁰ Accordingly, the first step in reviewing a punitive damages award on appeal is to review the record to determine whether it contains material evidence that supports a finding by clear and convincing evidence that the defendant acted intentionally, fraudulently,

¹⁰ Sw. Bell Tel. Co. v. Garza, 164 S.W.3d 607, 627 (Tex. 2004).

maliciously, or recklessly.¹¹ See, e.g., Buell-Wilson v. Ford Motor Co., 73 Cal. Rptr. 3d 277, 312 (Ct. App. 2008); Budget Car Sales v. Stott, 662 N.E.2d 638, 639 (Ind. 1996); York v. InTrust Bank, N.A., 962 P.2d 405, 429 (Kan. 1998); Flippo v. CSC Assocs. III, L.L.C., 547 S.E.2d 216, 223 (Va. 2001). At this stage, the appellate court must determine whether the jury could reasonably have been persuaded that the required factual findings were proved to be highly probable. Shrader-Miller v. Miller, 855 A.2d 1139, 1145 (Me. 2004). Stated another way, the appellate court must ask whether sufficient material evidence was presented to produce in the mind of a reasonable fact-finder a firm belief or conviction as to the matters required to be proven. Telecheck Servs., Inc. v. Elkins, 226 S.W.3d 731, 735 (Tex. Ct. App. 2007). Any lesser standard of review dilutes the sixteen-year-old requirement that plaintiffs seeking punitive damages must prove by clear and convincing evidence that the defendant acted intentionally, fraudulently, maliciously, or recklessly.¹²

If the appellate court determines that the plaintiff has proved by clear and convincing evidence that it is entitled to punitive damages, the second step of the appellate review process requires the appellate court to engage in an exacting appellate review to ensure that the punitive damages award is

¹¹ Cf. Shell v. Law, 935 S.W.2d 402, 405 (Tenn. Ct. App. 1996) (stating that “when we reach issues requiring the evidence to be clear, cogent and convincing, [we will] examine the record to determine if there is sufficient proof to constitute clear, cogent and convincing evidence to support the findings of the jury.”).

¹² Hodges v. S.C. Toof & Co., 833 S.W.2d at 901.

based on an application of the law rather than the decision-maker's caprice. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. at 418. Rather than being deferential to the trial court, Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 440 (2001), this review must be "independent." Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. at 435.

At this stage of the review, the appellate court must engage in an independent, de novo evaluation of the three "guideposts" for punitive damages first required in BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574-75 (1996). State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. at 418; Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. at 436. These guideposts include (1) the degree of reprehensibility of the defendant's conduct, (2) the disparity between the actual and potential harm suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. BMW of N. Am., Inc. v. Gore, 517 U.S. at 575.

An award of punitive damages is an expression of moral condemnation. Copper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. at 432. The purpose of this exacting appellate review is to assure that the defendant's conduct is the "most egregious of wrongs," Cf. Cambio Health Solutions, LLC v. Reardon, 213 S.W.3d 785, 792 (Tenn. 2006), and that it is so reprehensible that it must be both punished and deterred. Cf. Culbreath v. First Tenn. Bank Nat'l Ass'n, 44 S.W.3d 518, 528-29 (Tenn. 2001); Metcalfe v. Waters, 970 S.W.2d 448, 450 (Tenn. 1998). Using these principles, respectfully, it is my

view that this case is neither close nor difficult. Ms. Sparkman and Mr. Flax have failed to prove by clear and convincing evidence that DaimlerChrysler acted so recklessly with regard to the design, construction, and marketing of the 1998 Dodge Caravan that it should be punished by an award of punitive damages.

At the time the 1998 Dodge Caravan was designed and manufactured, there was a genuine principled debate in the automotive community regarding just how rigid or stiff car seatbacks should be. Some, like the plaintiffs' witness, Kenneth Saczalski, favored using seats that were more rigid than the seats that were generally being used in American vehicles. Others, like DaimlerChrysler, were wary of using more rigid seats because of their concern that making the front seats more rigid would expose the occupants of a vehicle to other, equally serious injuries. Accordingly, balancing the risks presented by impact occurring from various directions, DaimlerChrysler designed the front seats of the minivan to yield in a controlled manner in the event of a rear impact.

The evidence showed that the design of car seats is a complex engineering issue that requires reasonable safety trade-offs. In fact, the National Highway Traffic Safety Administration issued a report while this trial was in progress that stated: "Improving seating system performance is more complex than simply increasing the strength of the seatback. A proper balance in the seatback strength and compatible interaction with head restraints and seat belts must be obtained to optimize injury mitigation." Neither the industry nor the

government regulators have sided with Dr. Saczalski's proposals.

All the witnesses, including those testifying for DaimlerChrysler, stated that the FMVSS 207¹³ standard that had been in place for thirty years was inadequate. Accordingly, when DaimlerChrysler designed and built the 1998 Dodge Caravan, it set goals for seat strength that doubled the standards in FMVSS 207. The seat that DaimlerChrysler actually designed and installed in the 1998 Dodge Caravan exceeded even DaimlerChrysler's internal standards. It was essentially undisputed that the front seats in this minivan were "mainstream" seats, that is, that they were very similar to almost every other front outboard seat in similar vehicles.

There is no question that persons have been injured riding in the Dodge Caravan. The trial court determined that out of the 7,000,000 minivans that had been sold, there were thirty-seven similar incidents. However, all of the witnesses testified that automobiles should be designed in a way that enables them to be as safe as possible in light of the innumerable ways in which accidents can occur. While DaimlerChrysler may not have satisfied Dr. Saczalski, its seats were triple the strength required by FMVSS 207, and they exceeded the

¹³ 49 C.F.R. § 571.207 (2007). The purpose of this standard is to establish "requirements for seats, their attachment assemblies, and their installation to minimize the possibility of their failure by forces acting on them as a result of vehicle impact." 49 C.F.R. § 571.207, S1.

strength of many other automobile seats.¹⁴ On these objective facts,¹⁵ I find it difficult to conclude that the

¹⁴ A manufacturer's compliance with applicable governmental safety regulations and industry standards does not, by itself, prevent awards of punitive damages. However, evidence of a manufacturer's compliance with governmental and industry standards is evidence that the manufacturer did not recklessly disregard safety. See, e.g., David G. Owen et al., Madden & Owen on Products Liability § 18.6, at 305 (3d ed. 2000); Victor E. Schwartz et al., Guide to Multistate Litigation § 10.07, at 202 (1985); David G. Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. Chi. L. Rev. 1, 40-42 (1982) [hereinafter "Owen, Problems"]. Many government safety standards, including the numerous standards issued by the National Highway Transportation Safety Administration, have been adopted within a "gray area where the difficulties of defining defectiveness (the 'proper' mix of safety and its tradeoffs) are especially great." Owen, Problems, 49 U. Chi. L. Rev. at 41-42 & n.196. The difficulty for manufacturers is heightened even further when an industry is making safety decisions upon which experts and government regulators have been unable to reach any consensus. Accordingly, decisions made within these gray areas should not generally warrant a punitive damages award. See Owen, Problems, 49 U. Chi. L. Rev. at 40-42 & n.196.

¹⁵ The plaintiffs' evidence regarding DaimlerChrysler's recklessness includes the testimony of a former employee, Paul Sheridan, who chaired DaimlerChrysler's Minivan Safety Leadership Team. This committee was apparently created in late 1992, partially in response to an investigative story regarding the safety of car seats that had been aired on *Sixty Minutes* in February 1992. Its purpose was to advise upper level management about what needed to be done in the area of safety. Mr. Sheridan, who has been excluded from testifying regarding seatback design in other cases, Gardner ex rel. Gardner v. Chrysler Corp., 89 F.3d 729, 737-38 (10th Cir. 1996), testified that he showed the *Sixty Minutes* story at a team meeting in March 1993 and that the team discussed seatback

plaintiffs presented clear and convincing evidence that DaimlerChrysler acted so recklessly that the company should be punished beyond being required to pay compensatory damages.

III. THE EVIDENCE OF THE TWENTY-FIVE POST-SALE INCIDENTS

As part of the proof to support their post-sale duty to warn claim, Ms. Sparkman and Mr. Flax presented evidence regarding twenty-five incidents that occurred after the sale of the Sparkmans' minivan and that allegedly were similar to the accident that occurred on June 30, 2001. The Court has properly determined that the evidence of these incidents should not have been introduced because Ms. Sparkman and Mr. Flax cannot assert a post-

[Footnote continued from previous page]

strength. He also testified that he was ordered to collect and destroy the minutes of the March 1993 meeting and that the team was disbanded in November 1994. Chrysler discharged Mr. Sheridan in December 1994 after accusing him of leaking confidential developmental testing information to *Auto World* magazine. Mr. Sheridan denied the accusation. See Chrysler Corp. v. Sheridan, No. 227757, 2003 WL 327714 (Mich. Ct. App. Feb. 11, 2003), *perm. app. denied*, 666 N.W.2d 668 (Mich. 2003) (Table). Mr. Sheridan's testimony may very well reflect DaimlerChrysler's overreaction to the *Sixty Minutes* story and the existence of some internal dissension regarding how best to respond to the concerns about car seat safety raised by the story. However, taken in the context of all the evidence in this case, it does not demonstrate clearly and convincingly that DaimlerChrysler's engineers were acting recklessly when they designed a front seat for the 1998 Dodge Caravan that was intended to yield in a controlled way when the minivan was struck from behind.

sale failure to warn because they claimed that DaimlerChrysler was aware of the alleged dangerousness of the minivan's front seats before the time of the sale.¹⁶ However, the Court has also determined that the introduction of the evidence of these twenty-five post-sale incidents was harmless error. I respectfully cannot agree.

When appellate courts conduct a harmless error analysis under Tenn. R. App. P. 36(b), they must avoid acting like a second jury by basing their analysis on their own assessment of the defendant's guilt. State v. Rodriguez, 254 S.W.3d 361, ___, 2008 WL 1817361, at *10 (Tenn. 2008). Rather, harmless error scrutiny focuses on the actual basis for the jury's verdict, State v. Mallard, 40 S.W.3d 473, 489 (Tenn. 2001), and the impact that the erroneously admitted evidence had on the jury's decision-making. See State v. Denton, 149 S.W.3d 1, 16-17 (Tenn. 2004). A harmless error analysis requires a careful examination of the entire record to determine whether the erroneously admitted evidence more probably than not affected the judgment or resulted in prejudice to the judicial process. State v. Rodriguez, 254 S.W.3d at ___, 2008 WL 1817361, at *10.

¹⁶ The Court has not directly addressed DaimlerChrysler's argument that many of these incidents were not substantially similar to the collision that gave rise to this lawsuit. Based on my review of the record, it appears that DaimlerChrysler is correct, and thus there is a second, equally valid, basis for concluding that the admission of the evidence involving many of these incidents was error.

We visited the outer boundaries of the harmless error doctrine in 2004 when the Court, by a divided vote, upheld a \$7,366,000 verdict in a medical malpractice case by deciding that a trial judge's critical comment regarding a key witness's credibility in the presence of the jury was harmless error. Mercer v. Vanderbilt Univ., Inc., 134 S.W.3d 121, 134 (Tenn. 2004).¹⁷ The Court is returning to the outer boundary between harmful and harmless error in order to uphold this \$18,367,345 verdict. I cannot follow along.

Any objective reader of this voluminous record cannot help being struck by the frequency of the references in the plaintiffs' case to the other allegedly similar incidents in which persons riding in Chrysler minivans were injured when the seats yielded in rear end collisions. The plaintiffs' lawyers repeatedly argued to the jury that "[y]ou're going to hear about a bunch of them . . . There is no way to know for sure how many times Chrysler or DaimlerChrysler seatbacks have collapsed in wrecks" or that "the weak seatbacks . . . have killed and injured a lot of people" or that "[t]here is no evidence from DaimlerChrysler Corporation that those 37 are the only ones killed and injured."

Courts are generally cautious in the admission of similar incident evidence precisely because of the prejudice that it can carry.¹⁸ Such evidence has been

¹⁷ The trial court stated in the jury's presence that the witness had changed her testimony. Mercer v. Vanderbilt Univ., Inc., 134 S.W.3d at 144 (Drowota, C.J., dissenting).

¹⁸ 1 McCormick on Evidence § 2000m, at 800 (Kenneth S. Broun ed., 6th ed. 2006).

described as "extremely harmful to the defense"¹⁹ and "highly prejudicial,"²⁰ and it has been noted that the presentation of repetitive accident evidence can prejudice the jury.²¹ The references to other similar incidents in this case are so numerous that a reasonable person cannot be sure what evidence eventually tipped the jury in favor of holding DaimlerChrysler liable for the wrongful death of Joshua Flax or in calculating the compensatory and punitive damages or both. It is highly unlikely that the jury was not influenced in some way by the sheer volume of these allegedly similar incidents. Under these circumstances, the jury's assessment of DaimlerChrysler's liability and the amount of damages was, more probably than not, affected by the evidence of other similar incidents that should not have been admitted.

IV.

I do not relish the prospect of requiring these parties to try this case again. However, when reversible error infects the fact-finding process, a new trial is the only suitable remedy. For the reasons stated herein, I would reverse the judgment and remand the case for a new trial on the issue of compensatory damages only.

¹⁹ John Deere Co. v. May, 773 S.W.2d 369, 374 (Tex. Ct. App. 1989).

²⁰ Whaley v. CSX Transp., Inc., 609 S.E.2d 286, 300 (S.C. 2005).

²¹ David Crump, *Evidence, Economics, and Ethics: What Information Should Jurors be Given to Determine the Amount of a Punitive-Damage Award?*, 57 Md. L. Rev. 174, 229 (1998).

WILLIAM C. KOCH, JR., JUSTICE

**In the
Supreme Court
of Tennessee
At Nashville**

No. M2005-01768-SC-R11-CV

**JEREMY FLAX et al. v. DAIMLERCHRYSLER
CORPORATION et al.**

**Appeal by Permission from the Court of Appeals,
Middle Section Circuit Court for Davidson County
No. 02C-1288 Hamilton V. Gayden, Jr. Judge**

October 25, 2007 Session Heard at Maryville¹

Filed July 24, 2008

**Cornelia A. Clark, J., concurring in part and
dissenting in part.**

The heart-wrenching facts of this wrongful death/emotional distress case, which are adequately set forth in the majority opinion, need not be restated here. The tragedy visited upon this family

¹ Oral argument was heard in this case in Maryville, Blount County, Tennessee, as part of this Court's S.C.A.L.E.S. (Supreme Court Advancing Legal Education for Students) project.

is indeed great. The record, like the trial itself, is lengthy. The trial testimony is extensive and, at times, contradictory. The fact that the members of this Court disagree as to how to resolve some of the difficult legal issues—which are hotly contested—is no surprise. The case is complex on multiple levels and resolving the issues presented while attempting to achieve a just result has proven to be no easy task.

I.

In light of the settled principles discussed in Part II of the majority opinion, I fully concur in this part of the opinion, which affirms the Court of Appeals' reversal of the compensatory and punitive damage awards to Ms. Sparkman based on her negligent infliction of emotional distress claim. Like the majority, I believe that such claims must be supported by expert medical or scientific evidence as required by Camper v. Minor, 915 S.W.2d 437 (Tenn. 1996). The present case is no exception, notwithstanding the difficult circumstances experienced by Ms. Sparkman immediately following the accident. Although I agree with the plaintiffs that some circumstances obviously result in severe emotional distress, creating an exception to the heightened proof requirements of Camper would, in my view, undermine Camper's goal of bringing a measure of consistency and predictability to an area of the law that had become unwieldy precisely because of exceptions. See Camper, 915 S.W.2d at 445 (noting that ad hoc exceptions in emotional distress cases had "robbed the law of logic, consistency and fairness"). In my view, requiring all plaintiffs to meet the heightened proof requirements of Camper provides a much needed common thread in cases for negligent infliction of emotional distress.

Accordingly, the compensatory and punitive awards to Ms. Sparkman for her emotional distress cannot stand.

I further concur in that portion of Part IV of the majority opinion holding that the trial court erred in recognizing the plaintiffs' second failure to warn claim. The plaintiffs do not contend that the manufacturer of their minivan discovered problems with the seats after they purchased the vehicle. Thus, the case simply does not present facts necessary for us to consider the viability of a true post-sale failure to warn cause of action. For us to resolve that issue in the context of this case would be tantamount to giving an advisory opinion. See State v. Brown & Williamson Tobacco Corp., 18 S.W.3d 186, 193 (Tenn. 2000) (noting that courts are not to render advisory opinions). In order to have a justifiable controversy, a real question rather than a theoretical or hypothetical one must be at stake. Id. If the rule were otherwise, the "courts might well be projected into the limitless field of advisory opinions." Story v. Walker, 404 S.W.2d 803, 804 (Tenn. 1966) (internal citation omitted). It follows that deciding whether Tennessee common law should recognize a post-sale failure to warn claim must await another day.

I also concur in Part V of the majority opinion, which adopts the reasoning of the Court of Appeals in upholding miscellaneous evidentiary and other rulings of the trial court. These rulings concern the admission of similar incidents that occurred prior to the sale of the minivan, excluding accident data proffered by the manufacturer, the failure to grant a new trial as a sanction for purported discovery abuse by the plaintiffs, and not imposing a sanction for an

invalid ad damnum clause in the complaint. Like the majority, I conclude that these largely collateral issues have no merit.

II.

Where I part ways with the majority is in its analysis of the punitive damages issue in Part III of the opinion. The jury awarded \$5,000,000 in compensatory damages to the parents of Joshua for the child's wrongful death. The remitted amount of punitive damages awarded was \$13,367,345 for the child's death. The majority affirms these awards, finding specifically that the punitive award is supported by clear and convincing evidence of recklessness and that the admission of twenty-five purportedly similar accidents after the minivan was sold is harmless error.

Concerning evidence of the post-sale accidents, I agree with all of my colleagues that the introduction of proof about those incidents was error. In my view, Justice Koch, in his separate opinion, properly emphasizes the frequency of references in plaintiffs' case to other allegedly similar incidents, and I specifically agree with him that, as to the finding of recklessness required in order to award punitive damages, the admission of the error did more probably than not affect the jury's decision to award punitive damages. Thus, the error cannot be deemed harmless under Tenn. R. App. P. 36(b). I concur in Justice Koch's analysis. Therefore, I would reverse the judgment of punitive damages and remand the case for a new trial on that issue.

While the introduction of the twenty-five post-sale accidents casts serious doubt on the legitimacy of the punitive award, it does not, in my view, destroy the jury's decision to find liability and award

compensatory damages. The jury found the manufacturer liable on three grounds other than its breach of a post-sale duty to warn: (1) designing, manufacturing, and selling the minivan with defective seats,² (2) designing, manufacturing, and selling the minivan with unreasonably dangerous seats,³ and (3) failing to warn at the time the vehicle was sold. I agree with the majority that, viewing the record as a whole, there is adequate evidence to support the jury's decision to impose liability and award compensatory damages, despite the introduction of the post-sale accidents. See State v. Mallard, 40 S.W.3d 473, 489 (Tenn. 2001) ("[W]hen looking to the effect of an error on the trial, we will evaluate that error in light of all of the other proof introduced at trial.").

Because compensatory and punitive damage awards serve vastly different purposes,⁴ I have no

² A defective product is one that has a condition rendering the product "unsafe for normal or anticipatable handling and consumption." Tenn. Code Ann. § 29-28-102(2) (2000).

³ An unreasonably dangerous product is one that is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics, or that the product because of its dangerous condition would not be put on the market by a reasonably prudent manufacturer or seller, assuming that the manufacturer or seller knew of its dangerous condition." Tenn. Code Ann. § 29-28-102(8) (2000).

⁴ Compensatory damages are designed to make the plaintiff whole. Hodges, 833 S.W.2d at 902. In contrast, the purpose of punitive damages is to punish the wrongdoer and deter the wrongdoer and others from engaging in similar misconduct in the future. Id. at 900. Thus, unlike compensatory damages, an

difficulty affirming the compensatory award for the child's wrongful death. Although the improperly admitted evidence of post-sale incidents likely infected the jury's decision to deter and punish the manufacturer as an expression of moral condemnation, I do not believe the same can be said of the jury's decision to make the plaintiffs whole. That is, unlike with a punitive award, the reprehensibility of the manufacturer's actions in light of post-sale accidents was a nonfactor in evaluating whether to impose liability and calculate a compensatory award. Indeed, the entire concept of recklessness on the part of the manufacturer was irrelevant on those issues. Therefore, it is much less likely that the improperly admitted evidence tainted the jury's decision on issues having nothing to do with punitive damages. Accordingly, I would affirm the compensatory award for the child's wrongful death.

In summary, I concur with the majority on all issues except their affirmance of the punitive damages award. I would remand for a retrial only on the issue of punitive damages.

CORNELIA A. CLARK, JUSTICE

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award of punitive damages is not designed to compensate the injured party. Id.

**In the
Supreme Court
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No. M2005-01768-SC-R11-CV

**JEREMY FLAX et al. v. DAIMLERCHRYSLER
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**Appeal by Permission from the Court of Appeals,
Middle Section Circuit Court for Davidson County
No. 02C-1288 Hamilton V. Gayden, Jr. Judge**

October 25, 2007 Session Heard at Maryville¹

Filed July 24, 2008

GARY R. WADE, J., concurring.

I concur with Justice Holder and Chief Justice Barker as to the propriety of the award of \$5 million for the wrongful death of Jeremy Flax, apportioned one-half to the fault of the DaimlerChrysler Corporation [the "Defendant"] and the other one-half

¹ Oral argument was heard in this case in Maryville, Blount County, Tennessee, as part of this Court's S.C.A.L.E.S. (Supreme Court Advancing Legal Education for Students) project.

to Lewis Stockell. I further concur in their affirmance of the trial court's reduction of punitive damages against the Defendant regarding the wrongful death action from \$65,500,000 to \$13,367,345. Finally, I agree that the \$2.5 million in compensatory damages awarded Rachel Sparkman for the negligent infliction of emotional distress, one-half of which was adjudged against the Defendant, and the punitive damages of \$6,632,655, all of which was assessed against the Defendant, should be set aside.

Because of the lengthy trial in Davidson County and a transcript consisting of thousands of pages of pleadings, testimony, and exhibits, I commend the author, as well as the other members of this Court for the time and effort expended on record review and the resolution of these most difficult issues. I part with my colleagues who join in the lead opinion only as to the viability of a cause of action based upon the post-sale duty to warn. By way of explanation, I would acknowledge the Restatement (Third) of Torts: Products Liability § 10 (1998) as authority, as did the trial court. I believe, therefore, that the trial court (which, of course, could not have known prior to the verdict that the jury would ultimately sustain the pre-sale duty to warn claim) properly admitted testimony about similar accidents taking place after the sale of the 1998 Dodge Grand Caravan for the limited purpose of establishing that the Defendant had notice of the defective seat design, which contributed to the death of Joshua Flax. For that reason, I see no need for a harmless error analysis.

The complaint included allegations that the Caravan, manufactured by the Defendant and

operated by Jim Sparkman at the time of the accident, included front seats that were defective and unreasonably dangerous, and which posed a danger to any children seated directly to the rear.² Because the Defendant had failed to issue any warnings to consumers of that danger, there were allegations that the company was responsible for compensable damages under the Tennessee Products Liability Act of 1978. Tenn. Code Ann. §§ 29-28-101 to -108 (2000). Moreover, Jeremy Flax, Joshua's father, and Rachel Sparkman, his mother [the "Plaintiffs"], maintained that punitive damages were warranted because the Defendant, who knew or should have known of the safety defects, had acted intentionally and recklessly, by continuing to market and sell the Caravan as particularly safe for families with children.

About three weeks before the trial, the Plaintiffs filed a trial brief advocating jury instructions pertaining to the manufacturer's liability, not only for harm caused by a pre-sale failure to warn of the defective seating, but also for a post-sale failure to warn. More specifically, the Plaintiffs argued that a jury charge on post-sale failure to warn was warranted because many Caravan owners had notified the Defendant after 1998 about the poor performance of the seats in relatively minor accidents. The Plaintiffs sought permission to

² In this state, the purpose of a complaint is to provide notice of a claim; "minimum general facts that would support a potential cause of action" are necessary. Wicks v. Vanderbilt Univ., M2006-00613-COA-R3-CV, 2007 WL 858780, at *13 (Tenn. Ct. App. Mar. 21, 2007).

introduce as evidence several documents arising from telephone calls to "Cares," a call-in service offered by the Defendant to its customers. Some 385 instances were brought to the attention of the trial court in the pretrial proceedings. Many of these complaints involved collisions into the rear of the minivans where the front seats had yielded or collapsed in a backward manner, and a passenger was injured as a result. In several instances, children sitting behind the yielding seats were seriously injured. Following these reports, engineers employed by the Defendant inspected the vehicles and provided their findings to the company.

Shortly before the trial, the Defendant filed a reply brief, arguing that this state did not recognize a post-sale duty to warn and citing an unpublished opinion from the Court of Appeals as authority for that proposition. Irion v. Sun Lighting, Inc., No. M2002-00766-COA-R3-CV, 2004 WL 746823, at *17 (Tenn. Ct. App. Apr. 7, 2004) ("Although the Restatement (Third) of Torts adopts some post-sale duties, Tennessee had not adopted those provisions and, in any event, Ms. Irion's proof would not trigger those duties."). The Defendant further objected to the admission of the complaints on hearsay grounds.

At the conclusion of a pretrial hearing, the trial court held that the ruling in Irion did not preclude the application of the most recent version of the Restatement and permitted an alternative claim under the post-sale duty to warn theory. Because the trial court concluded that the telephone complaints about the seats were not to be admitted to prove the truth of the matter asserted, but to establish that the Defendant had adequate notice of the potential danger, thirty-seven of these

complaints were held to be admissible. Twelve of the complaints were prior to the Plaintiffs' purchase of the Caravan. Twenty-five occurred afterward and, therefore, were only relevant to the theory of recovery based upon post-sale duty to warn. At trial, this evidence was presented as a part of the Plaintiffs' proof. At the conclusion of the testimony, the trial court instructed the jury to consider the complaints of the similar accidents only for the limited purpose of establishing that the Defendant was aware of the potential defect in the seats of the Caravan.³ Ultimately, the jury determined that the Defendant failed in its duty to issue warnings both prior to the sale of the vehicle and afterward, and awarded compensatory damages.

The Tennessee Rules of Civil Procedure allow for alternative pleadings:

A party may set forth two (2) or more statements of a claim or defense alternately or hypothetically. When two (2) or more statements are made in the alternative and one (1) of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may

³ The Defendant filed a motion for an extraordinary appeal pursuant to Rule 10 of the Tennessee Rules of Appellate Procedure with regard to the post-sale duty issue. This motion was denied by the trial court and, later, also denied by the Court of Appeals. See Flax v. DaimlerChrysler Corp., No. M2005-01768-COA-R3-CV, 2006 WL 3813655, at *3 (Tenn. Ct. App. Dec. 27, 2006).

also state as many separate claims or defenses as he or she has, regardless of consistency.

Tenn. R. Civ. P. 8.05(2) (2007); Barnes v. Barnes, 193 S.W.3d 495, 501 (Tenn. 2006) (“[A]lternative pleadings are expressly permitted, regardless of consistency.”); see also Worley v. Weigel’s, Inc., 919 S.W.2d 589, 594 (Tenn. 1996) (“An alternative pleading may not be used as an admission.”). Like the trial judge, I believe that in these circumstances the Plaintiffs were entitled to present alternative theories of recovery as to duty to warn and that there was material evidence to support the verdict of the jury as to the viability of either claim. See Cover v. Cohen, 461 N.E.2d 864, 871 (N.Y. 1984) (stating that whether a duty to warn arises depends on the “degree of danger which the problem involves and the number of instances reported”).

The relevant section of the Restatement provides as follows:

(a) One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller’s failure to provide a warning after the time of sale or distribution of a product if a reasonable person in the seller’s position would provide such a warning.

(b) A reasonable person in the seller’s position would provide a warning after the time of sale if:

(1) the seller knows or reasonably should know that the product poses a

substantial risk of harm to persons or property; and

(2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and

(3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and

(4) the risk of harm is sufficiently great to justify the burden of providing a warning.

Restatement (Third) of Torts: Products Liability § 10.⁴

In my assessment, a post-sale duty comports with both public policy and traditional tort theory. The many jurisdictions recognizing a duty of post-sale failure to warn agree that a claim for damages should be permitted when the manufacturer is aware that the product is defective or unreasonably dangerous after the sale and fails to take reasonable steps to warn those buyers who have purchased the

⁴ One commentator has described the Restatement Third of Torts' summary of products liability law as "the most important development in the past three decades for those who must live in the 'nuts and bolts' world of product liability law." Victor E. Schwartz, The Restatement (Third) of Torts: Products Liability: A Guide to its Highlights, 34 *Tort & Ins. L.J.* 85 (1998). This Court has previously looked to the Restatement Third for guidance as to tort law in Tennessee. See, e.g., Mercer v. Vanderbilt Univ., Inc., 134 S.W.3d 121, 129 (Tenn. 2004).

product. See, e.g., Luvick v. Wil-Rich, 588 N.W.2d 688, 693 (Iowa 1999); Patton v. Hutchinson Wil-Rich Mfg. Co., 861 P.2d 1299, 1313 (Kan. 1993); Owens-Illinois, Inc. v. Zenobia, 601 A.2d 633, 645-46 (Md. 1992); Comstock v. Gen. Motors Corp., 99 N.W.2d 627, 634 (Mich. 1959); see also, Douglas R. Richmond, Expanding Products Liability: Manufacturers' Post-Sale Duties to Warn, Retrofit and Recall, 36 Idaho L. Rev. 7, 18 (1999). The first state to recognize the duty to warn arising after a sale was Michigan. In a case involving defective breaks in the 1953 model Buicks, the Michigan Supreme Court held that a manufacturer, who after a sale discovers a latent defect in its product, may have the responsibility "to take all reasonable means to convey effective warning to those who" have already purchased the product. Comstock, 99 N.W.2d at 634. Since this decision, a growing number of states have recognized that a manufacturer's responsibility to try to prevent foreseeable harm to its consumers does not terminate at the time of the sales transaction. On occasion, it is essential for companies to actively issue "warnings about risks discovered after sale . . . to prevent significant harm to persons and property." Restatement (Third) of Torts: Products Liability § 10, cmt. a. A post-sale warning reduces "the chance of injury by equalizing the asymmetry of information between the parties." Luvick, 588 N.W.2d at 693. Because of its specialized knowledge and frequent dealings with a product, the manufacturer is in a far better position than the consumer to discover hidden defects that are not apparent to either the buyer or seller when a product is first sold. See Comstock, 99 N.W.2d at 634.

The requirements for a post-sale duty to warn differ from a pre-sale duty in more ways than just the timing of the transaction. Because it costs more to identify and warn consumers after the sale than before the product leaves the seller's control, see Patton, 861 P.2d at 1313, a jury should be required to conduct a cost-benefit analysis when assessing liability. Restatement (Third) of Torts: Products Liability § 10(b)(4). Other factors to consider include the kind of the warning to be issued, the people to whom it is to be given, the nature of the industry, the degree of the potential harm that may result, the difficulty in locating purchasers of the product, whether the warning will be heeded if given, the potential life of the product, the kind of product involved, and the number sold. See, e.g., Rekab, Inc. v. Frank Hrubetz & Co., 274 A.2d 107 (Md. 1971); Comstock, 99 N.W.2d at 634; Cover, 461 N.E.2d at 871; Kozlowski v. John E. Smith's Sons Co., 275 N.W.2d 915 (Wis. 1979). These authorities recognize that there is not "an absolute continuing duty, year after year, for all manufacturers to warn of a new safety device which eliminates potential hazards." Kozlowski, 275 N.W.2d at 923. Whether harm was foreseeable after a manufacturer knew or should have known of a latent defect is a key issue. See Olson v. Prosoco, Inc., 522 N.W.2d 284, 288-89 (Iowa 1994). As a threshold determination of whether a post-sale duty may arise in a given case, trial courts should "carefully examine the circumstances for and against imposing a duty to provide a post-sale warning." Restatement (Third) of Torts: Products Liability § 10 cmt. a.

Considering the manner in which the post-sale duty to warn has been described by other jurisdictions, I am persuaded that its function and

goals are compliant with the state of tort law in Tennessee. Consumer protection is always a priority. Further, in my view, the language of our statute defining a "product liability action" does not preclude a credible claim made under a post-sale duty to warn. Tenn. Code Ann. § 29-28-102 (2000) (stating that product liability actions include a "breach of or failure to discharge a duty to warn or instruct, whether negligent, or innocent; misrepresentation, concealment, or nondisclosure, whether negligent, or innocent") (emphasis added).

In this case, there was material evidence for a reasonable jury to find a post-sale duty to warn. There was testimony as to each of the four elements. With regard to the first, a reasonable juror could have determined that the Defendant, fully aware of the complaints from its customers, knew or should have known that the seats in its minivans posed a substantial risk of harm. Because buyers of the Caravan would have been readily identifiable, and it can reasonably be assumed that the drivers would not know that the seats would yield so dramatically in a rear-end collision, the second element was satisfied. See Comstock, 99 N.W.2d at 634 (imposing liability for post-sale failure to warn against an automobile manufacturer because of latent defects in the automobile). The third element was met because the Defendant could have issued warnings about the potential for injury to those occupants located directly behind the defective front seats. Fourth and finally, considering the nature of the reported injuries—serious bodily harm to children—a reasonable juror could have found that "the risk of harm is sufficiently great to justify the burden of providing a warning."

As stated, it is my view that the trial court did not err by admitting for notification purposes only the twenty-five similar incidents that occurred after the sale of the Caravan. For this reason, I believe the harmless error analysis in the lead opinion with regard to this evidence is unnecessary; otherwise, I fully concur.⁵

⁵ By concurring with the majority, I am especially mindful that under our constitution, "the right of trial by jury shall remain inviolate." Tenn. Const. Art. I, § 6. The right to trial by jury has its origin in the common law and in the Constitution of North Carolina at the time of the formation and adoption of the Tennessee Constitution in 1796. Patten v. State, 426 S.W.2d 503 (Tenn. 1968); Garner v. State, 13 Tenn. (5 Yer.) 159 (1833). The right to jury includes the entitlement to have all factual issues resolved during a trial. Hurt v. Earnhart, 539 S.W.2d 133 (Tenn. Ct. App. 1976). It guarantees that the issues of fact will be determined by twelve jurors properly instructed by the trial court. State v. Garrison, 40 S.W.3d 426 (Tenn. 2000); see also Grooms v. State, 426 S.W.2d 176 (Tenn. 1968). Although not generally applicable to litigation of an equitable nature, the right to jury must not be hampered by conditions or encumbrances. Smyrna v. Ridley, 730 S.W.2d 318 (Tenn. 1987); Neely v. State, 63 Tenn. (4 Baxt.) 174 (1874). Most importantly, a jury verdict limits the scope of review on appeal, as Justice Holder has so accurately acknowledged; this court is limited to determining whether there is material evidence to support the verdict, and, in making that determination, we must take the strongest legitimate view of all the evidence in favor of the verdict, allowing all reasonable inferences in its favor and discarding all inferences to the contrary. Crabtree Masonry Co. v. C & R Constr., Inc., 575 S.W.2d 4 (Tenn. 1978). The right to trial by jury is too precious to ignore. Our duty, in general, is to yield to the will of a well-informed jury, which has seen and heard first-hand the quantity and quality of the evidence, rather than conduct and independent review from a written record. To substitute our judgment for that of the jury

GARY R. WADE, JUSTICE

[Footnote continued from previous page]

denigrates the importance of this basic principle in our system of jurisprudence.

APPENDIX B

IN THE COURT OF APPEALS OF TENNESSEE AT NASHVILLE

JULY 12, 2006 Session

**JEREMY FLAX, ET AL. V. DAIMLERCHRYSLER
CORPORATION, ET AL.**

**Direct Appeal from the Circuit Court for
Davidson County**

No. 02C-1288

Hamilton V. Gayden, Jr., Judge

No. M2005-01768-COA-R3-CV

This appeal comes from a wrongful death action brought by the parents of an infant child who died from injuries suffered in an automobile accident. In 2001, the mother was one of several passengers involved in a collision in which a man, driving his pickup truck and speeding, rear-ended the minivan occupied by mother and her infant son. The plaintiff parents' infant son suffered a fatal injury when his head collided with the head of another occupant of

the vehicle, who was seated in the passenger seat directly in front of the child and whose seat fell backwards during the accident. The mother and father of the deceased child brought suit against the manufacturer of the minivan and the man who drove the truck that struck the minivan. The parents' claims against the manufacturer were for wrongful death of their son as a result of the manufacturer's defective design of the front seat backs in the minivan and failure to warn of the defect, and the mother also brought a claim against the manufacturer for negligent infliction of emotional distress as a result of witnessing her son's injury. The jury found for the parents and awarded them \$5 million in compensatory damages for the wrongful death claim, and awarded the mother \$2.5 million for her negligent infliction of emotional distress claim. The jury also found that the manufacturer had acted recklessly and was liable for punitive damages. The trial court bifurcated the trial, and the jury returned a \$98 million punitive damages verdict against the manufacturer. The trial court remitted the punitive damage award to \$20 million. The manufacturer filed a timely notice of appeal to this Court alleging several errors at trial: that the parents' complaint contained an invalid *ad damnum* clause; that the plaintiff mother had not satisfied the proof requirements for a negligent infliction of emotional distress claim; that there was insufficient evidence of recklessness to support an award of punitive damages; that the trial court improperly recognized a post-sale duty to warn in Tennessee; numerous evidentiary errors and alleged discovery abuse warranting a mistrial; and excessive damage awards. We affirm in part and reverse in part.

**Tenn. R. App. P. 3; Appeal as of Right;
Judgment of the Circuit Court Affirmed in
Part, Reversed in Part**

ALAN E. HIGHERS, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and HOLLY M. KIRBY, J., joined.

Theodore J. Boutrous, Jr., of Los Angeles, CA, Thomas H. Dupree, Jr., of Washington, D.C., and Lawrence A. Sutter, of Franklin, TN, for the Appellants.

Gail Vaughn Ashworth, of Nashville, TN, James E. Butler, Jr., of Atlanta, GA, George W. Fryhofer III, of Atlanta, GA, and Leigh Martin May, of Atlanta, GA, for the Appellees.

OPINION

**I. FACTUAL BACKGROUND AND
PROCEDURAL HISTORY**

The facts concerning the automobile accident central to this litigation are not in dispute. On June 30, 2001, Defendant Louis Stockell, Jr. ("Stockell") was driving his pickup truck on Old Charlotte Pike in Davidson County, Tennessee. Plaintiff Rachel Sparkman ("Ms. Sparkman") and her infant son, Joshua Flax ("Joshua") were occupants of a 1998 Dodge Caravan ("the Caravan") minivan which was pulling out of a residential driveway onto Old Charlotte Pike. Ms. Sparkman's parents owned the minivan, and her father, Jim Sparkman ("Grandfather Sparkman") was driving the vehicle. Joe McNeill ("McNeill"), a friend of the family, sat in the passenger seat, and Joshua was sat in a child-safety seat directly behind McNeill. Ms. Sparkman sat in the seat next to Joshua and directly behind the driver's seat. Sitting in the back

row of seats were Ms. Sparkman's mother and McNeill's wife.

As Grandfather Sparkman drove the Caravan onto Old Charlotte Pike from the driveway, he noticed Stockell speeding toward the vehicle and drove into the oncoming lane of traffic to avoid a collision. As he did so, Stockell also moved into the oncoming lane of traffic and collided with the rear of the Caravan. At the time of impact, McNeill's seat fell backward and McNeill's head collided with Joshua's. This collision resulted in skull and brain injuries to Joshua from which the child died the next day. None of the other occupants of the minivan were seriously injured.

On May 7, 2002, Ms. Sparkman and Joshua's father, Jeremy Flax ("Flax," collectively, "Plaintiffs" or "Appellees"), filed a complaint against both DaimlerChrysler Corporation ("DCC," "Chrysler," or "Appellant"), as manufacturer of the vehicle, and Stockell. Plaintiffs alleged wrongful death under four theories: negligence of DCC, strict liability in tort of DCC, fraudulent concealment of defect and misrepresentation by DCC,¹ and negligence of Stockell.

¹ Initially, Ms. Sparkman's parents, as owners of the minivan, had been included as plaintiffs in the lawsuit. Their claim of fraudulent concealment and misrepresentation was allegedly based upon their buying the Caravan in reliance upon DCC's advertisements that stressed the safety features of the minivan. However, Joshua's grandparents eventually dropped their claim, and they were dismissed voluntarily as parties by court order on October 29, 2004, pursuant to Tennessee Rule of Civil Procedure 41.01. Plaintiffs Rachel Sparkman and Jeremy Flax filed a recast complaint on October 25, 2004.

Plaintiffs' claim of negligence against DCC alleged that it had breached its duty "to exercise reasonable care to design, test, manufacture, inspect, market, distribute, and sell the Caravan free of the unreasonable risk of physical harm to prospective owners, users, and occupants, including plaintiffs." Plaintiffs' claim under strict liability alleged that the design of the front seat backs in the Caravan made the seats defective and unreasonably dangerous. Plaintiffs asserted that "[t]he front seats and seat backs in the 1998 Dodge Caravan lacked the strength and structural integrity to hold ... [Grandfather Sparkman and McNeill] in an upright and stable position during a rear-end collision in a foreseeable impact." Plaintiffs further alleged that DCC knew that the design of the front seats rendered them defective or unreasonably dangerous, and that DCC should be held liable for "advertising and marketing the 1998 Dodge Caravan in an attempt to induce families with children to purchase the 1998 Dodge Caravan and to place their children behind seats which are designed to collapse in rear end collisions." Ms. Sparkman claimed to have relied upon DCC's representations as to the safety of placing children behind these seats when she placed Joshua in his car seat behind the front passenger seat. Plaintiffs claimed that DCC knew, or should have known, from its own testing and from other incidents of injuries to minivan occupants, "that the front passenger seat and seat back would fail, collapse, give way, or bend backwards in foreseeable rear-end collisions and that serious injury to the vehicle occupants could result." Plaintiffs' claim against Stockell asserted that he had been negligent in speeding, failing to maintain his vehicle, failing to keep a proper lookout, and failing to maintain a safe

and reasonable distance behind the Caravan, and that his negligence together with the negligence and design defects of DCC caused Plaintiffs' injuries.²

Plaintiffs sought compensatory damages for the wrongful death of their son, including damages for Joshua's mental and physical suffering, general damages for the full life of Joshua, and damages for loss of filial consortium, as well as punitive damages. Ms. Sparkman individually sought damages for negligent infliction of emotional distress ("NIED"). Plaintiffs did not set forth a specific dollar amount sought in compensatory damages, but instead used the language "in an amount to be determined by the enlightened conscience of the jury and as demonstrated by the evidence" Similarly, Plaintiffs designated the amount sought in punitive damages against DCC to be "an amount to be determined by the enlightened conscience of the jury

² On October 29, 2003, DCC filed a motion for sanctions against defendant Stockell for his failure to appear at depositions and for his failure to respond to interrogatories. DCC requested sanctions in the form of denying Stockell the opportunity to raise any defenses at trial and testify to any matters in the lawsuit. The trial court entered an order granting DCC's motion for sanctions against Stockell, which Plaintiffs did not oppose, on July 15, 2004. This order excluded Stockell from testifying at trial or otherwise presenting defenses to Plaintiffs' claims against him. The fault of Stockell was therefore pre-determined by the trial court, and the jury was instructed that "[t]he Court finds Louis Stockell was at fault." The verdict form presented to the jury for its Phase One deliberation was already marked "Yes" to the question, "Do you find the defendant Louis A. Stockell, Jr., to be at fault?". The allocation of fault, however, was left for determination by the jury, which found DCC and Stockell to each be 50% at fault.

to be sufficient to punish [it] and deter it from similar future conduct."

On August 6, 2002, in light of discovery requests to DCC from Plaintiffs, the trial court entered a sharing protective order, which applied to those documents that DCC considered "proprietary and competitively sensitive, and that it wishe[d] to protect from dissemination." The nature of these documents varied greatly and included depositions of customers involved in other litigation against the company, DCC testing data related to the specific seat in question (which Chrysler referred to as the "NS" model), DCC records detailing specific complaints from customers about the seat's performance in accidents, DCC's own accident investigation reports in response to these complaints, and police reports and photographs from accidents involving automobiles equipped with the seat. The evidence relating to injuries from occasions of NS seat "collapse," or "yield," alleged by other customers was referred to by the parties and the trial court as "other similar incident," or "OSI," evidence. DCC filed a motion in limine regarding the OSI evidence, seeking to exclude the exhibits as irrelevant. The trial court conducted extensive pre-trial hearings dealing with the admissibility of this evidence. Of the several hundred incidents related to NS seat failure, and based upon Plaintiffs' offers of proof through collaborative research by their expert witness Kenneth Saczalski, the trial court ultimately determined that only 37 of these OSI's were substantially similar enough to the Flax accident to be relevant on the issues of dangerousness or defect, or notice to DCC.

On October 4, 2004, DCC argued its motion for summary judgment on the issue of punitive damages, which the court denied. On October 28, 2004, in response to the trial court's allowing Plaintiffs' post-sale duty to warn claim to proceed, DCC filed a motion and accompanying memorandum with this Court for an extraordinary appeal pursuant to Rule 10 of the Tennessee Rules of Appellate Procedure, seeking a continuance of the November 1, 2004, trial date. This Court denied the motion in a mandate issued on December 7, 2004.

Trial began in circuit court in Davidson County on November 3, 2004, before the Honorable Hamilton V. Gayden, Jr. and a jury. Recurring issues at trial involved the tendency of the NS seats to "yield" or "collapse" in rear-end accidents. Plaintiffs alleged that this design in fact increased the risk of injury to passengers who sat in the second row of seats behind the NS seats, and that stiffer, more rigid seats, such as the ones found in the 1996 Sebring, should have been utilized in the minivan that would be resistant to "collapse" in rear-end accidents. Plaintiffs claimed that DCC's own testing of its minivan seats made it aware of the danger to passengers located behind the NS seats in rear-end collisions, as did many complaints from consumers who had experienced similar problems with the seats.

Another important aspect of Plaintiffs' case was the alleged inadequacy of Federal Motor Vehicle Safety Standard 207 ("FMVSS 207"), which is the government standard for seat back strength that was established by the National Highway Traffic Safety Administration ("NHTSA"). Plaintiffs argued that DCC's undisputed compliance with FMVSS 207 did not shield it from liability for negligence or strict

liability, because FMVSS was a static test, and accidents were often dynamic events, meaning that both vehicles are moving. Plaintiffs argued that FMVSS 207 was "meaningless and tells us nothing about what happens in car wrecks." They argued that DCC's own engineers were aware of the deficiency of this standard, and further, that DCC designed seats that were significantly stronger than the NS seats in the 1996 Sebring and 1998 Ram pickup truck, but that DCC chose not to implement stronger seats into minivans until the 2001 "RS" seat.

DCC claimed that the NS was purposefully designed this way to prevent seat occupants from absorbing energy from a collision, and instead allowing the seat itself to absorb this energy by "yielding," which would minimize the risks of injury to the seat occupant. DCC maintained that its "yielding" design was preferable to a stiffer, more rigid design, because the latter would create a higher risk of head and neck injuries to a seat occupant in accidents, and especially when the occupant was "out of position." DCC claimed to have based its design decision on the relative statistical infrequency of rear-end accident fatalities. DCC argued that its yielding design was not unusual within the industry because a yielding seat design was present in most vehicles.

Plaintiffs began their case by showing the jury the videotaped deposition of Neville D'Souza, a DaimlerChrysler seat engineer who had designed the model seats for the original 1984 Chrysler minivans and who had certain expertise with later models of Chrysler minivan seats, including the NS seats at issue. Other videotaped testimony showed by

Plaintiffs included depositions of other DCC employees from both the present case and from other cases in which DCC had been involved.³ Plaintiffs' first live witnesses included the Caravan passengers involved in the Flax accident and eyewitnesses to the accident. Plaintiffs called two expert witnesses, Ronald Kirk, a consulting engineer whose primary focus was investigation, analysis, and reconstruction of motor vehicle collisions, and Kenneth Saczalski, a consulting biomechanical engineer who had, since the 1980's, conducted crash tests concerning seat back strength in automobiles. Plaintiffs also called: Colleen Buss, a woman whose child had suffered a skull fracture in an accident involving her 1997 Dodge Caravan; Dr. Joseph Burton, who testified about the injuries that killed Joshua and the possibility that the child had experienced conscious pain and suffering; Paul Sheridan, a Chrysler employee who had been a member of the "NS Body Minivan Complexity Team" in the 1990's; and Vanderbilt University professor William Damon, who was hired by Plaintiffs as an expert in finance and economics to ascertain the present value of lost income suffered by Joshua. Plaintiffs called individually father Jeremy Flax and mother Rachel Sparkman, who testified regarding his and her relationship with Joshua.

³ These witnesses were Andrew Foster, a Chrysler employee whose deposition testimony from the case of Buller v. DaimlerChrysler was shown, and Mitchel Porterfield, a Chrysler call center employee who was deposed for the Flax case. Porterfield's testimony indicated that Chrysler had received customer complaints about minivan seat backs as far back as the 1980's.

DCC's defense began with the testimony of Gregory Stephens, an engineer specializing in collision research and analysis. DCC next called Gary Moore, a Nashville firefighter and EMT who responded to the Flax minivan accident. DCC concluded their case with the expert testimony of Michael James, a mechanical engineer and accident investigator, who provided testimony regarding seat back design and strength, and David Blaisdell, a research engineer who also analyzed automobile accidents. Both experts testified about beneficial aspects of the NS seat design to occupants, as well as certain injury risks to passengers that might increase from incorporating a stiffer design.

On November 15, 2004, DCC argued its motions for directed verdict as to the NIED claim, asserting that Sparkman had failed to satisfy her *prima facie* case by not presenting expert testimony, and on the issue of punitive damages, asserting that no reasonable juror could find by clear and convincing evidence that its conduct was reckless, and that it was improper for the court to impose a punitive award against them under a theory of post-sale duty to warn. The trial court denied these motions. On November 16, NHTSA issued a ruling in which it announced its decision to terminate rulemaking procedures for amending FMVSS 207 (regarding seat back strength) pending further study, and the trial court allowed the document into evidence. Trial concluded on November 22, 2004, and the jury returned a verdict for Phase I of the trial finding DCC and Stockell each 50% liable for compensatory damages and awarding Plaintiffs a total of \$7.5 million in compensatory damages: \$5 million to Plaintiffs for the wrongful death claim and \$2.5 million to Ms. Sparkman individually on her NIED

claim, and finding that punitive damages would be awarded based upon a finding of recklessness by DCC. After the verdict, DCC argued its motion to set aside the part of the judgment awarding punitive damages, which the trial court overruled. On November 23, 2004, the jury returned a verdict for Phase II of the trial, awarding \$65.5 million and \$32.5 million, for the wrongful death and NIED claims respectively, against DCC in punitive damages.

On January 20, 2005, DCC filed a motion notwithstanding the verdict on punitive damages and negligent infliction of emotional distress, "and for a new trial on all other issues." DCC argued these motions before the trial court on March 18, 2005. On April 28, 2005, some four months after the trial was over, DCC filed a supplemental motion seeking to have the judgments vacated for Plaintiffs' alleged failure to include a valid *ad damnum* clause in their complaint. DCC also filed a motion for a new trial based upon Plaintiffs' alleged failure to produce discovery materials related to tests performed in previous litigation by their expert, Saczalski, on the RS dual recliner seat – materials which showed the tendency of these seats to yield in a manner similar to the NS seat. The trial court denied these motions and remitted the punitive award to \$20 million in its July 11, 2005 final order and judgment, but it denied Plaintiffs any discretionary costs as a sanction for failure to discover the Sebring tests. Plaintiffs accepted the remitted punitive award under protest. Appellant filed a timely notice of appeal to this Court on July 22, 2005.

II. ISSUES PRESENTED

On appeal, the issues raised for consideration by this Court, as we perceive them, are as follows:

1. Whether Plaintiffs' complaint adhered to the *ad damnum* clause, or statement of damages, requirement per T.C.A. § 29-28-107 for a products liability action brought in Tennessee;
2. Whether the evidence put forth by Ms. Sparkman for her NIED claim could support an award based upon this theory;
3. Whether the trial court improperly recognized a post-sale duty to warn in Tennessee;
4. Whether there was sufficient proof to support a jury finding of recklessness by DCC that warranted the imposition of punitive damages;
5. Whether evidentiary errors of the trial court or discovery misconduct by Plaintiffs require this Court to order a new trial; and
6. Whether the damage awards in this case were excessive or unconstitutional. For the following reasons, we affirm in part and reverse in part.

III. DISCUSSION

A. *Ad Damnum Clause*

Appellant first alleges that it was error for the trial court to enter judgment for Plaintiffs when Plaintiffs' complaint did not contain a valid *ad damnum* clause stating the amount of damages sought. DCC claims that because Plaintiffs' complaint prayed for damages "in an amount to be determined by the enlightened conscience of the jury," rather than a specific dollar amount, that the trial court was "powerless" to enter judgment on

their claim. DCC alleges that the language used by Plaintiffs in their complaint falls short of the requirements of T.C.A. § 29-28-107 for a statement of damages in a products liability action, and that it was error for the trial court to find the clause legally sufficient.

Appellees contend that their complaint met the requirements of T.C.A. § 29-28-107, because they stated "an amount" of damages sought. Plaintiffs argue that DCC's contention that this statute "requires a plaintiff to request a specific dollar sum" is neither supported by the wording of the statute or Tennessee common law. Plaintiffs accuse DCC of placing undue reliance on Tennessee cases that express the rule that "where a plaintiff requests a specific dollar sum in its complaint, the plaintiff cannot recover a judgment in excess of that specific sum." Appellees argue that these cases are immaterial because Appellees did not receive a verdict that exceeded the amount sought in the complaint, but rather a verdict in the exact amount of damages sought in the complaint. Appellees finally propose that even if DCC's argument is correct, that it is deemed to have waived the issue by not raising it in its answer, via pretrial motion, or at trial, but for the first time "five months after the trial and verdict."

"Under Tennessee law, a trial court may not enter a judgment in excess of the amount sought in the plaintiffs complaint." *McCracken v. City of Millington*, No. 02 A01-9707-CV-00165, 1999 Tenn. App. LEXIS 185, at *26 (Tenn. Ct. App. March 17, 1999) (citing *Gaylor v. Miller*, 166 Tenn. 45, 50, 59 S.W.2d 502, 504 (1933)). Rule 12.08 of the Tennessee Rules of Civil Procedure states: "A party waives all

defenses and objections which the party does not present either by motion as hereinabove provided, or, if the party has made no motion, in the party's answer or reply, or any amendments thereto” *TENN. R. CIV. P. 12.08 (2006)*.

In 1978, the General Assembly enacted the “Tennessee Products Liability Act,” which is codified at T.C.A. §§ 29-28-101-108. *First Nat'l Bank of Louisville v. Brooks Farms*, 821 S.W.2d 925 (Tenn. 1991). T.C.A. § 29-28-107 (2006) provides special pleading requirements for actions brought under the Act, and states: “Any complaint filed in a products liability action shall state an amount of such suit sought to be recovered from any defendant.” The Act contains a section defining its key terms, and the term “product liability action” is defined to include:

all actions brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formula, preparation, assembly, testing, service, warning, instruction, marketing, packaging or labeling of any product. “Product liability action” includes, but is not limited to, all actions based upon the following theories: strict liability in tort; negligence; breach of warranty, express or implied; breach of or failure to discharge a duty to warn or instruct, whether negligent, or innocent; misrepresentation, concealment, or nondisclosure, whether negligent, or innocent; or under any other

substantive legal theory in tort or contract whatsoever[.]

T.C.A. § 29-29-102(6) (2006). An action for wrongful death has been held to fall within the scope of this definition. *See, e.g., Milligan v. American Hoist and Derrick Co.*, 622 F. Supp. 56, 58 (W.D. Tenn. 1985).

It is clear that T.C.A. § 29-28-107 controls the pleading of damages in this case. As Plaintiffs alleged a defective or unreasonably dangerous seat back design and warning, they were required to state an amount of damages sought. Neither Plaintiffs nor Defendants, however, have cited to any cases in this jurisdiction that have addressed whether the requirements under this section mandate the pleading of a *specific* dollar amount in a products liability action brought in Tennessee.

The cases that Appellant cites in support of its position are readily distinguishable from the situation presently before us. In response to Appellees' arguments that any post-trial challenge to the sufficiency of the *ad damnum* clause has been waived, Appellants correctly state that "challenges based on an *ad damnum* clause are properly raised in a defendant's post-trial briefing[]," however the cases that DCC cite for this proposition involve the appellate review of a specific type of *ad damnum* challenge: one that attacks the propriety of an entry of judgment in excess of a specific dollar amount articulated in the original complaint. *See Russell v. City of Lawrenceburg*, No. 01-A-01-9505-CV-00200, 1995 Tenn. App. LEXIS 703 (Tenn. Ct. App. Nov. 1, 1995); *Baker v. Kline*, 1988 Tenn. App. LEXIS 579 (Tenn. Ct. App. Sept. 23, 1988).

The rationale for allowing appellate review in such cases is not applicable in this case. A defendant

would logically have no basis to support an *ad damnum* challenge to a judgment in excess of a specific amount stated in the complaint until after the entry of judgment that did in fact exceed this amount. In this case, however, DCC's challenge is to the sufficiency of Plaintiffs' *ad damnum* clause itself. DCC could easily have raised such a challenge in their June 2002 answer, at which time the trial court might have allowed Plaintiffs to amend their complaint to state a specific sum. *See, e.g. Roberson v. Motion Indus.*, No. E2004-02310-C0A-R3-CV, 2005 Tenn. App. LEXIS 391 (Tenn. Ct. App. July 7, 2005) (plaintiff amended *ad damnum* clause from \$2 million to \$3.4 million); *Guess v. Maury*, 726 S.W.2d 906, 908 (Tenn. Ct. App. 1986) (after defendants filed their answers, plaintiffs amended their complaint to increase their *ad damnum* clause). Instead, Appellant chose to pursue this challenge for the first time nearly three years later, after many months of discovery, a trial lasting over two weeks, and even four months after the trial had concluded. We therefore hold that DCC waived this defense under Rule 12.08 of the Tennessee Rules of Civil Procedure.

The trial court denied DCC's motion for a new trial based on the *ad damnum* clause challenge in its June 23, 2005 memorandum opinion. The court found that since "the plaintiffs did state that they were seeking damages in a specific amount 'to be determined by the enlightened conscience of the jury . . .,'" and since there were "no cases on point in Tennessee that state that when damages are requested, but there is not a specific sum stated, the judgment is void[,] Plaintiffs had satisfied the requirements of T.C.A. § 29-28-107. Since we have found that DCC waived this defense by not raising it in its answer pursuant to Rule 12.08 of the

Tennessee Rules of Civil Procedure, we need not review the correctness of this finding.

B. Negligent Infliction of Emotional Distress

The next issue that Appellants raise for our consideration is whether the evidence offered at trial was sufficient to support an award to Ms. Sparkman for negligent infliction of emotional distress. DCC asserts that it is entitled to judgment on the NIED claim because Ms. Sparkman failed to introduce expert testimony to support this claim. DCC states that because Ms. Sparkman's claim was a "stand-alone" claim, the heightened proof requirements established by our supreme court in *Camper v. Minor*, 915 S.W.2d 437 (Tenn. 1996), demanded that she put on expert medical or scientific proof of her emotional injury.

Conversely, Ms. Sparkman argues in support of the award that her NIED claim was not a stand-alone claim, but one of "multiple claims for damages," and was thus excepted from the heightened proof requirements of *Camper*. In support of this proposition, she cites *Estate of Amos v. Vanderbilt University*, in which our supreme court acknowledged that the *Camper* heightened proof requirements did not apply to all NIED claims, but only those determined to be "stand-alone." 62 S.W.3d 133, 137 (Tenn. 2001). Ms. Sparkman rationalizes, and the trial court found, that her claim was one of multiple claims of damages related to the wrongful death claim, including filial consortium, and therefore that the heightened proof requirements for stand-alone claims were not applicable to this NIED claim.

The application of the law to the facts found by the trial court is a question of law that this Court reviews *de novo*. *State v. Maclin*, 183 S.W.3d 335, 343 (Tenn. 2006) (citing *State v. Yeargan*, 958 S.W.2d 626, 629 (Tenn. 1997); *Beare Co. v. Tenn. Dep't of Revenue*, 858 S.W.2d 906, 907 (Tenn. 1993)). The trial court in the present case, in denying DCC's post-trial motion for judgment notwithstanding the verdict on Ms. Sparkman's NIED claim, agreed with her characterization of the claim as not being "stand-alone." In its June 20, 2005 memorandum opinion, the court stated:

In this case, the Court finds that expert proof was not necessary since Rachel Sparkman's NIED claim was not a stand-alone claim. Ms. Sparkman's NIED [sic] was derivative of her claim as a co-plaintiff for the wrongful death of Jeremy [sic-Joshua] Flax. In addition to Ms. Sparkman's NIED claim, she also brought a claim for damages resulting from the loss of filial consortium resulting from Joshua's death. Since Ms. Sparkman brought multiple claims for damages, her NIED claim is not considered by the Court to be stand-alone. The Court also finds that there is sufficient evidence to support Ms. Sparkman's NIED claim. The emotional distress of seeing her young child fatally injured in a car accident would clearly meet the requirements of the tort and would be seen as a severe injury. Therefore, the Court is of the opinion that Rachel Sparkman's claim for NIED was properly before the Court

and her claim did not require any additional expert proof.

We assign error to the trial court's finding that Ms. Sparkman's claim was not stand-alone, and we therefore hold that Ms. Sparkman failed to meet the proof requirements of *Camper* for a stand-alone NIED claim by not presenting expert medical or scientific proof of her emotional injuries.

In light of the complexities involved when dealing with emotional and mental forms of damages, the legal history of the negligent infliction of emotional distress action in Tennessee is replete with decisions that evince the efforts of our courts to maintain a remedy that strikes a proper balance between the prevention of frivolous suits and the allowance of legitimate claims for emotional damages.⁴ In 1996, the Tennessee Supreme Court definitively set forth the requirements for bringing a successful NIED claim in *Camper v. Minor*, 915 S.W.2d 437 (Tenn. 1996). In *Camper*, the plaintiff had been operating his truck when a teenage driver, the defendant, had pulled her own vehicle in front of the plaintiff unexpectedly. *Id.* at 439. The plaintiff

⁴ Early NIED cases in Tennessee, the most notable of which was *Memphis St. Ry Co. v. Bernstein*, 194 S.W. 902 (Tenn. 1917), held that plaintiffs in these cases needed to prove a physical injury as a result of the emotional distress in order for their claims to be actionable. See *Bernstein*, 194 S.W. at 903 ("For the bodily pain and suffering produced by such fright and thereby proximately resulting from the accident, a recovery was permissible. For fright alone the plaintiffs below were not entitled to recover, and the charge which authorized a computation of damages based upon fright alone was erroneous . . .").

had collided with the defendant, and the defendant was killed instantly. *Id.* The plaintiff had approached the defendant's vehicle immediately after the accident and viewed the defendant's dead body in the wreckage. *Id.* The plaintiff sued the defendant's estate, claiming that as a result of viewing the body he had "sustained mental and emotional injuries resulting in loss of sleep, inability to function on a normal basis, outbursts of crying and depression." *Id.* While the plaintiff had undergone some psychiatric treatment, he did not offer any expert medical evidence of his alleged emotional injuries. *Id.*

The court acknowledged its concern about a developing trend of inconsistent treatment of NIED claims in Tennessee cases over the years, particularly as to whether an accompanying physical manifestation of injury was required. *See Camper*, 915 S.W.2d at 444-46. The court explained that while it had never overruled *Bernstein* and its "physical manifestation" requirement, it had carved out exceptions to this requirement over the years:

At a very early stage in the law's development, this Court carved out an exception to the physical manifestation rule by holding, in *Hill v. Travelers Ins. Co.*, 154 Tenn. 295, 294 S.W. 1097 (1927), that a plaintiff could recover for mental damages occasioned by the defendants' mutilation of her husband's dead body during an autopsy, notwithstanding that the plaintiff had neither suffered a contemporaneous physical injury nor exhibited physical symptoms of her alleged mental

injuries. This Court explained its departure from the *Bernstein* rule by simply stating "that mental suffering and injury to the feelings would be ordinarily the natural and proximate result of knowledge that the remains of a deceased husband had been mutilated, is too plain to admit of argument." *Hill*, 294 S.W. at 1099. See also *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695, 8 S.W. 574 (1888) (establishing a similar exception where message carrier failed to deliver telegraphs to plaintiff regarding the imminent death of her brother, thus preventing her from sitting by his bedside when he died).

Camper, 915 S.W.2d 437, 444 (Tenn. 1996). The court went on to explain that the inconsistent treatment of NIED claims under *Bernstein* was not only evident in "creating outright exceptions to the *Bernstein* rule[,"] but that in some cases the Tennessee courts had simply applied the physical manifestation rule "in such a way as to soften its potential harshness." *Id.* at 444-45 (citing *Johnson Freight Lines, Inc. v. Tallent*, 53 Tenn. App. 464, 384 S.W.2d 46 (1964) (where the court shifted its focus to the quality of evidence presented in support of the plaintiff's claim instead of the physical manifestations of injuries); *Laxton v. Orkin Exterminating Co.*, 639 S.W.2d 431 (Tenn. 1982) (where the plaintiffs had ingested water contaminated with chemicals, and although a medical investigation revealed that no damage had been done, the court held that a jury could conclude that a physical injury had been sustained "when a

plaintiff has ingested an indefinite amount of a harmful substance").

In response to what it referred to as the "confusing" and "unpredictable" state of the law surrounding a negligent infliction of emotional distress claim at this time, the *Camper* court held that it was time "to abandon the rigid and overly formulaic 'physical manifestation' or 'injury' rule[.]" and set forth a new test for meeting a *prima facie* case for an NIED claim in Tennessee. *Camper*, 915 S.W.2d at 446. The court held that this type of claim was to be addressed under a general negligence approach, and further expounded:

In other words, the plaintiff must present material evidence as to each of the five elements of general negligence - - duty, breach of duty, injury[,] or loss, causation in fact, and proximate, or legal, cause[. . .]-- in order to avoid summary judgment. Furthermore, we agree that in order to guard against trivial or fraudulent actions, the law ought to provide a recovery only for "serious" or "severe" emotional injury[. . .] A "serious" or "severe" emotional injury occurs "where a reasonable person, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case."[. . .] Finally, we conclude that the claimed injury or impairment *must be supported by expert medical or scientific proof*[. . .]

Camper, 915 S.W.2d at 446 (emphasis added) (citations omitted). The *Camper* court then remanded the case to the trial court for further proceedings. *Camper*, 915 S.W.2d at 446.

In *Estate of Amos v. Vanderbilt University*, 62 S.W.3d 133 (Tenn. 2001), plaintiff Julie Amos (Amos), was a woman who had, prior to the establishment of HIV-testing procedures for blood used in transfusions, contracted the HIV virus after receiving a transfusion of contaminated blood from the defendant hospital in 1984. *Estate of Amos*, 62 S.W.3d at 135. Years later, while still unaware of her HIV-positive status, Amos gave birth to a child who had contracted the virus *in utero*, and the child died of an AIDS-related illness about a month later. *Id.* at 135. In 1991, Amos and her husband brought an action against the hospital, asserting multiple claims for damages including wrongful birth, negligence, and negligent infliction of emotional distress. *Id.* In 1992, Amos died of AIDS, and her husband continued her claims on the behalf of her estate, alleging that the hospital was liable for its failure to warn Amos of her possible infection. *Id.* After a jury verdict, the trial court held that the estate's award for emotional injuries could not stand because the plaintiffs had not presented expert or scientific testimony of serious or severe emotional injury as required by *Camper*, and the court reduced the jury award to reflect only the amount of Amos's medical and funeral expenses. *Id.*

Upon review, the defendants in *Estate of Amos* urged the Court of Appeals to affirm the trial court's decision on NIED, because the plaintiffs had not satisfied *Camper*'s requirements of "expert medical or scientific proof and serious or severe injury." *Id.*

at 136. The court explained: "The special proof requirements in *Camper* are a unique safeguard to ensure the reliability of stand-alone' negligent infliction of emotional distress claims." *Id.* at 136-37. The court went on to state that "[w]hen emotional damages are a 'parasitic' consequence of negligent conduct that results in multiple types of damages, there is no need to impose special pleading or proof requirements that apply to 'stand-alone' emotional distress claims." *Id.* at 137. The court characterized *Camper* as contemplating "a plaintiff who was involved in an incident and received only emotional injuries." *Id.* Noting that the plaintiffs' claims for wrongful birth and negligent failure to warn included "a request for damages for emotional injuries stemming from those causes of action as well as a request for other damages[]," the court found that the plaintiffs' NIED claim was not "stand-alone," and therefore the heightened proof requirements of *Camper* did not apply. *Id.* at 137-38.

In *Dodson v. Saint Thomas Hospital*, No. M2004-01102-C0A-R3-CV, 2005 WL 819725 (Tenn. Ct. App. Apr. 7, 2005), a case arising after *Estate of Amos*, the appellant had been fired from her job at a hospital, and she sued the hospital and two employees alleging both intentional and negligent infliction of emotional distress. *Id.* at *1. After affirming the trial court's granting of a summary judgment motion in favor of the defendants on the intentional infliction of emotional distress claim, we turned to the negligent infliction of emotional distress claim in light of precedent:

As to the claim for negligent infliction of emotional distress, our Supreme Court has outlined the *prima facie* case for

negligent infliction of emotional distress. In order to make such a case, the plaintiff must prove the elements of duty, breach of duty, injury or loss, causation in fact, and proximate cause. *See Camper v. Minor*, 915 S.W.2d 437, 446 (Tenn. 1996). In *Camper*, the Court further held that recovery for negligent infliction of emotional distress claims, *where there is no physical injury*, is limited to serious or severe emotional injury supported by expert medical or scientific proof. *Id.* From our review of the record, Ms. Dodson has provided no scientific or medical proof to meet the burden of establishing an injury under this tort. Consequently, summary judgment was correct on these causes of action.

Id. at *8 (emphasis added). The expert proof requirement of *Camper* has been similarly noted in other NIED cases in Tennessee. *See, e.g., Lourcey v. Estate of Scarlett*, 146 S.W.3d 48, 52 (Tenn. 2004) (stating that in Tennessee, an NIED claim requires "that the plaintiff establish the elements of a general negligence claim: (1) duty, (2) breach of duty, (3) injury or loss, (4) causation in fact, and (5) proximate causation... In addition, the plaintiff must establish the existence of a serious or severe emotional injury that is supported by expert medical or scientific evidence...") (citations omitted)); *Miller v. Willbanks*, 8 S.W.3d 607, 614 (Tenn. 1999) (recognizing "that legitimate concerns of fraudulent and trivial claims are implicated when a plaintiff brings an action for a purely mental injury" and holding that "when the conduct complained of is

negligent rather than intentional, the plaintiff must prove the serious mental injury by expert medical or scientific proof" (citing *Camper*, 915 S.W.2d at 446)).

We believe that the facts of the present case correspond more closely with *Camper* than with *Amos*. Accordingly, the policies articulated in *Camper* lead us to conclude that Ms. Sparkman did not satisfy the *prima facie* case for an NIED action in Tennessee. The precedent concerning the proof requirements for NIED claims suggests that when there are not multiple claims for damages by a plaintiff that would deem an NIED cause of action "parasitic," the action is stand-alone, and the heightened proof requirements set forth in *Camper* will control. See *Dodson*, 2005 WL 819725, at *8; accord *Estate of Amos*, 62 S.W.3d at 137 ("The subjective nature of 'stand-alone' emotional injuries creates a risk for fraudulent claims."); see also *Isabel v. Velsicol Chemical Co.*, 327 F. Supp. 2d 915, 920 (W.D. Tenn. 2004) ("Notwithstanding the general language of *Amos*, under *Laxton*[, 639 S.W.2d 431], it appears that emotional distress damages may not be 'parasitic' upon property damages alone, because the plaintiffs in *Laxton* suffered property damage based upon diminished value, but the Court still required them to prove some *de minimis* 'physical injury' . . ."); but see *Riley v. Whybrew*, 185 S.W.3d 393, 401 (Tenn. Ct. App. 2005) (holding that a claim for property damage under a nuisance theory is enough to prevent an accompanying NIED claim from being stand-alone).

While the record reflects that Ms. Sparkman received minor injuries in the accident, including bruises on her legs, a pulled muscle from holding onto the armrest, and a knot on the back of her head,

she sought no recovery for these physical injuries. Ms. Sparkman similarly sought no recovery for any property damage that might have deemed the NIED claim "parasitic" under our analysis in *Riley*, 185 S.W.3d at 401. Ms. Sparkman never offered expert proof of any emotional injuries that might have resulted from her viewing Joshua after the accident. The testimony of Dr. Joseph Burton, a forensic pathologist who testified about the injuries to Joshua from the accident, was asked no questions about Ms. Sparkman's emotional injuries, so he provided no insight for the jury in this regard.

Camper stated that "[a] 'serious' or 'severe' emotional injury occurs 'where a reasonable person, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.'" *Camper*, 915 S.W.2d at 446 (citing *Rodrigues v. State*, 472 P.2d 509, 520 (Haw. 1970); *Paugh v. Hanks*, 6 Ohio St. 3d 72, 451 N.E.2d 759, 765 (Ohio 1983); *Plaisance v. Texaco, Inc.*, 937 F.2d 1004, 1010 (5th Cir. 1991); PROSSER AND KEETON ON THE LAW OF TORTS, § 54, at 364-65, n.60). During cross-examination, Ms. Sparkman testified that she had received no professional counseling for emotional injuries sustained from the accident. DCC counsel asked Ms. Sparkman, "You have coped with it as best you could on your own?", to which she replied, "I have friends and family that helped me through it."

Furthermore, since the NIED claim was brought as the sole claim by Ms. Sparkman individually, and as a cause of action distinct from the wrongful death claim, which sought filial consortium damages and was brought by the parents jointly, it would be difficult for us to characterize her claim in any way

other than stand-alone. Together with the lack of claims for physical injuries or property damages, the separate nature of these claims persuades us to find that Ms. Sparkman's NIED claim was not "parasitic" of the wrongful death claim, but was instead a stand-alone cause of action brought by Ms. Sparkman individually. Therefore, the NIED claim was not one of "multiple claims for damages" as contemplated by *Estate of Amos*, 62 S.W.3d at 137. Since Ms. Sparkman's NIED claim is one "for a purely mental injury," we believe that it is a stand-alone claim. See *Miller*, 8 S.W. 3d at 614 ("legitimate concerns of fraudulent and trivial claims are implicated when a plaintiff brings an action for a purely mental injury"). As such, it was necessary for Ms. Sparkman to present expert proof of her emotional injuries in order to establish a *prima facie* case for NIED.

While it is difficult for this Court to comprehend the emotional effects of seeing the effects of such a catastrophic injury to one's child after an automobile accident, we believe that to affirm the compensatory and punitive awards for Ms. Sparkman's NIED claim would be in contravention of the proof requirements for a stand-alone NIED claim brought in Tennessee in light of *Camper* and its progeny. For these reasons, we reverse the compensatory and punitive portions of the judgment that correspond with this claim as to defendant DCC.

However as to defendant Stockell, the negligent driver whose truck collided with the Caravan and who neglected to cooperate with the parties during trial and has not joined in this appeal, we affirm the portion of the compensatory NIED award for which he was found liable. As the Western Section of this

Court recently held in *Mairose v. Fed. Express Corp.*, No. W2005-01527-C0A-R3-CV, 2006 Tenn. App. LEXIS 598, at *1849:

Generally, “[a] reversal is binding on the parties to the suit, but does not control the interests of parties who did not join, or were not made parties, to the appeal . . .” 5 C.J.S. APPEAL & ERROR § 961 (1993). However, when a non-appealing parties’ “rights and liabilities and those of the parties appealing are so interwoven and dependent as to be inseparable, . . . a reversal as to one operates as a reversal as to all.” Id. In such case, “[w]here less than all of the coparties appeal from a severable judgment in which the interests of the parties are independent, only the part of the judgment pertaining to appellants may be reversed.” Id. § 930; see also *Rogers v. Bouchard*, 60 Tenn. App. 555, 449 S.W.2d 431, 438 (Tenn. Ct. App. 1969).

Defendant Stockell did not file an appellate brief with this Court or otherwise join in this appeal. As noted above, Stockell’s fault was pre-determined by the trial court in response to his repeated failures to respond to interrogatories or appear at depositions during discovery. In its final order, the trial court entered a judgment against Stockell for \$1,250,000 in compensatory damages, which represented his 50% liability on Ms. Sparkman’s NIED claim. As we have found that Stockell’s rights and liabilities are not so interwoven with or dependent upon those of DCC as to be inseparable, we affirm the

compensatory award of \$1,250,000 against him and in favor of Ms. Sparkman individually.

C. Post-Sale Duty to Warn

DCC's also assigns error to the trial court's decision to allow the post-sale duty to warn claim to be presented to the jury as an additional theory of liability against DCC. Appellant argues that the decision by this Court in *Irion v. Sun Lighting, Inc.*, No. M2002-00766-COA-R3-CV, 2004 Tenn. App. LEXIS 210 (Tenn. Ct. App. Apr. 7, 2004), established that Tennessee does not recognize a manufacturer's post-sale duty to warn. DCC argues that it was deeply prejudiced by the court's recognition of this theory.⁵ The first reason, which we shall address in this section, is that the trial court allowed Plaintiffs to impose an additional basis for liability on the wrongful death and NIED claims, in contravention of precedent by this Court in the *Irion* decision.

Appellees counter this theory of error by arguing that *Irion* did not hold that Tennessee would never recognize a post-sale duty to warn, but that it "simply considered the touchstones for post-sale duty to warn set forth in the Restatement (Third) of Torts, noted that Tennessee had not adopted the Restatement, and found that, in any event, the evidence did not satisfy the requirements of the

⁵ Appellants also argue that the jury finding of recklessness in its Phase I deliberation, which in turn would facilitate the award of punitive damages, could have improperly been based upon the post-sale duty to warn theory through the admission of evidence relating to other occurrences of seat failure that occurred after the sale of the Caravan in May of 1998. We address this argument in Section E, below.

Restatement [(Third)]." Plaintiffs argue that this issue is a matter of "purely academic" interest, but vaguely add that they "can hardly imagine a record more suitable to the recognition of that claim." Appellees provide no guidance, however, as to why the instant case is so particularly well-suited to our adoption of this new theory of recovery in Tennessee.

We believe that our statements in *Irion v. Sun Lighting, Inc.*, No. M2002-00766-C0A-R3-CV, 2004 Tenn. App. LEXIS 210 (Tenn. Ct. App. Apr. 7, 2004) are dispositive of this issue. In that case, a plaintiff sought recovery against a lamp manufacturer and a seller of the lamp after her child had placed a pillow over the lamp and started a fire, which resulted in property damage. *Id.* at *1-2. The plaintiff mother brought a products liability suit alleging negligence, strict liability in tort, and breach of implied warranty by the defendants, because the lamp was not equipped with a protective guard over the bulb to prevent combustible materials from catching fire. *Id.* at *2. The plaintiff also proposed several other reasons for imposing liability on the defendants, including the related claims of failure to conduct post-sale testing and breach of a post-sale duty to warn. *Id.* at *52-53. In affirming the trial court's grant of summary judgment for the defendants, this Court stated:

To the extent she also claims that there was a post-sale duty to warn, we note that, like the majority of states, Tennessee does not recognize a post-sale duty to warn. Although the Restatement (Third) of Torts adopts some post-sale duties, Tennessee had [sic] not adopted those provisions and,

in any event, Ms. Irion's proof would not trigger those duties.

Irion, 2004 Tenn. App. LEXIS 210, at *53 (citing Douglas R. Richmond, *Expanding Products Liability: Manufacturers' Post-Sale Duties to Warn, Retrofit and Recall*, 36 IDAHO L. REV. 21 (1999)).

T.C.A. § 20-9-502 (2006) provides: "If any counts in a declaration are good, a verdict for entire damages shall be applied to such good counts." Tennessee courts have held on the basis of this statute "that a trial court's erroneous instruction on one count of a multi-count suit is harmless error if its instructions as to the other counts were proper." *Tutton v. Patterson*, 714 S.W.2d 268, 271 (Tenn. 1986) (citing *Tenn. Cent. Ry. Co. v. Umenstetter*, 155 Tenn. 235, 237, 291 S.W. 452, 452-53 (1927); *Bloodworth v. Stuart*, 221 Tenn. 567, 577, 428 S.W.2d 786, 792 (1968)). In Tennessee, "we review the jury charge in its entirety and consider it as a whole in order to determine whether the Trial Court committed prejudicial error. The charge will not be invalidated as long as it fairly defines the legal issues involved in the case and does not mislead the jury." *Cruze v. Ford Motor Co.*, No. 03A01-9907-CV-00245, 1999 Tenn. App. LEXIS 833, at *6-7 (Tenn. Ct. App. Dec. 16, 1999) (citing *Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439, 446 (Tenn. 1992)). Tennessee Rule of Appellate Procedure 36(b) provides for appellate relief only when an error has more likely than not resulted in prejudice to the party. TENN. R. APP. P. 36(b). If no error has occurred, or if the errors that did occur were harmless, then we must affirm the judgment. *Union Planters Nat'l Bank*, 43 S.W.3d at 501 (citing

Doochin v. U.S. Fid. & Guar. Co., 854 S.W.2d 109, 112 (Tenn. Ct. App. 1993)).

Tennessee, like the majority of states, does not recognize a post-sale duty to warn. *Irion*, 2004 Tenn. App. LEXIS 210, at *53. We have found no cases arising after the *Irion* decision that have addressed the particular facts or evidence that might encourage us to adopt this theory of recovery in Tennessee. Appellees' alternative theory of recovery against DCC for the breach of a post-sale duty to warn of possible dangers or defects in its minivan seats should not, therefore, have been submitted to the jury. We find error in the trial court's instruction to the jury on this claim. However, because we find that the trial court correctly instructed the jury on Plaintiffs' remaining theories of recovery under their wrongful death claim, specifically strict liability and negligence, we view its instruction on a post-sale duty to warn claim as harmless error, and we affirm the entry of judgment for Plaintiffs as to the jury's wrongful death compensatory award.

D. Evidentiary Errors and Discovery Abuse

DCC assigns error to the trial court's admission of "other incidents" evidence regarding minivan seatback accidents that the trial court found to be substantially similar to the Flax accident, but which Appellant describes as "irrelevant." DCC alleges that the trial court erroneously deviated from its own articulated standard⁶ for substantial similarity when

⁶ At a preliminary motion hearing held on October 25, 2004, the trial court provided the following guidelines for a "substantially similar" incident in this case:

[Footnote continued on next page]

it admitted 37 of these "other similar incidents" (OSI's) into evidence. DCC claims that the trial court also erred in its exclusion of DCC's "real world accident data," which Appellant describes as "highly relevant when evaluating a particular design choice." Furthermore, DCC alleges that Plaintiffs' failure to provide them with certain crash test results of the dual recliner "RS"⁷ seat, conducted by Plaintiffs' expert Saczalski for another case in which he testified, prejudiced them and warrants a new trial, which was denied them by the trial court.

Appellees argue that they made a sufficient showing of substantial similarity of the 37 OSIs when offering them into evidence in pretrial conferences. They say that this evidence was extremely relevant in their case against DCC, not only in showing that the defendant had notice of a problem with its NS minivan seats, but also in establishing the existence of a defect in these seats with regard to the strict liability claim. Appellees

[Footnote continued from previous page]

But I can say that a substantial similarity in this case would be a rear-end collision between two moving vehicles with catastrophic injuries. I won't limit that to passengers in the rear or the middle seats but also to the front seats. If you can cull that down, I would appreciate it.

As far as the force is concerned, it would have to be reasonably near the Delta V forces that happened in this case.

⁷ The RS minivan seat design followed the NS design, and was implemented into DCC minivans beginning in the year 2001.

claim that DCC's "real world accident data" was properly excluded by the trial court because DCC did not attempt to make a showing of substantial similarity of the accidents reflected in this data to the Flax accident. Appellees dispute that Saczalski's failure to discover the RS tests warrants a new trial, because the RS seats were not the "safe, non-defective, feasible alternative design advocated by" Plaintiffs and Saczalski. Instead, Appellees insist that the alternative design that Saczalski recommended was the 1996 Sebring seat, which expert testimony amply supported as a stronger alternative to the NS.

1. Admissibility of 37 Other Similar Incidents

"Generally, the admissibility of evidence is within the sound discretion of the trial court." *Mercer v. Vanderbilt Univ., Inc.*, 134 S.W.3d 121, 131 (Tenn. 2004) (citing *Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439, 442 (Tenn. 1992)). "The trial court's decision to admit or exclude evidence will be overturned on appeal only where there is an abuse of discretion." *Id.* "Under the abuse of discretion standard, a trial court's ruling 'will be upheld so long as reasonable minds can disagree as to the propriety of the decision made.'" *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (citing *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000); *State v. Gilliland*, 22 S.W.3d 266, 273 (Tenn. 2000)). "A trial court abuses its discretion only when it 'applies an incorrect legal standard, or reaches a decision which is against logic or reasoning or that causes an injustice to the party complaining.' *Id.* (citing *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999)). "The abuse of discretion standard does not permit the appellate court to

substitute its judgment for that of the trial court.” *Id.* (citing *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998)).

“Evidence is relevant and therefore admissible if it has ‘any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.’” *Biscan v. Brown*, 160 S.W.3d 462, 468 (Tenn. 2005) (citing TENN. R. EVID. 401). “Evidence that is relevant under Rule 401 may be excluded ‘if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury’” *Id.* (citing TENN. R. EVID. 403). The key provision of the Tennessee Products Liability Act provides as follows: “[a] manufacturer or seller of a product shall not be liable for any injury to a person or property caused by the product unless the product is determined to be in a defective condition or unreasonably dangerous at the time it left the control of the manufacturer or seller.” T.C.A. § 29-28-105(a) (2006); *Whitehead v. Toyota Motor Corp.*, 897 S.W.2d 684, 689 (Tenn. 1995). “Defective condition” is defined at T.C.A. § 29-28-102(2) (2006) as “a condition of a product that renders it unsafe for normal or anticipatable handling and consumption.” “Unreasonably dangerous” is defined in T.C.A. § 29-28-102(8) (2006), which states:

[u]nreasonably dangerous means that a product is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics, or that the

product because of its dangerous condition would not be put on the market by a reasonably prudent manufacturer or seller assuming that the manufacturer or seller knew of its dangerous condition.

Admissibility of evidence of other accidents is a common issue arising in negligence and products liability cases. 1 MCCORMICK ON EVIDENCE § 200, at 800 (Kenneth S. Broun ed., 6th Practitioner's Ed. 2006). In Tennessee, "evidence of other accidents is admissible at trial for two purposes: (1) to show the existence of a particular dangerous condition or (2) to show the defendant's knowledge of the dangerous condition." *Stroming v. Houston's Restaurant, Inc.*, No. 01A-01-9304-CV-00189, 1994 WL 658542, at *2 (Tenn. Ct. App. Nov. 23, 1994) (citing *John Gerber Co. v. Smith*, 150 Tenn. 255, 266, 263 S.W. 974, 977 (1924); *Winfree v. Coca-Cola Bottling Works*, 19 Tenn. App. 144, 147, 83 S.W.2d 903, 905 (1935); *Ellis v. Memphis Cotton Oil Co.*, 3 Tenn. Civ. App. (Higgins) 642, 650 (1913)). Cases in Tennessee have also held that accidents occurring after the one in question may be admissible to show the dangerous nature of the product in question:

Where the dangerousness or safe character of the place, method, or appliance which is alleged to have caused the accident or injury is in issue, evidence is admissible in a proper case that other similar accidents or injuries, actual or potential, have *theretofore, or at the same time, or thereafter* resulted at or from such place, method, or appliance.

Winfree, 19 Tenn. App. at 147, 83 S.W.2d at 905 (emphasis added), Petition for Certiorari Denied by Supreme Court, June 10, 1935; *see also Graham v. Cloar*, 205 S.W.2d 764 (Tenn. Ct. App. 1947), Petition for Certiorari Denied by Supreme Court October 3, 1947. "If the evidence is being offered to show the existence of a particular hazard or danger, the party seeking to use the evidence must lay a foundation establishing substantial similarity between the prior accidents and the present accident." *Stroming*, 1994 WL 658542, at *2 (citing *John Gerber Co. v. Smith*, 150 Tenn. at 266, 263 S.W. at 977). The similarity requirement does not require that the circumstances of the accidents be identical in every particular. *Id.* at *3 (citing 1 MCCORMICK ON EVIDENCE § 200, at 844 n.4 (John W. Strong ed., 4th Practitioner's Ed. 1992). Sufficient proof of substantial similarity requires

a showing that the condition or instrumentality that caused the earlier accidents was in substantially the same condition at the time of the earlier accidents as it was at the time of the present accident. *John Gerber Co. v. Smith*, 150 Tenn. at 268, 263 S.W. at 977; *Martin v. Miller Bros. Co.*, 26 Tenn. App. 110, 117, 168 S.W.2d 187, 189-90 (1942). It also requires that the condition or instrumentality shown to be the common cause of the earlier accidents must also be the condition or instrumentality of the present accident. *Turgeon v. Commonwealth Edison Co.*, 630 N.E.2d 1318, 1322 (Ill. App. Ct. 1994).

Id. at *3. "The sufficiency of the showing of similarity of conditions is primarily a matter for the discretion of the trial judge." *Barrett v. Raymond Corp.*, No. 59, 1991 Tenn. App. LEXIS 38, at *4 (Tenn. Ct. App. Jan. 24, 1991) (citing *Powers v. J.B. Michael & Co., Inc.*, 329 F.2d 674 (6th Cir. 1974)).

It is clear from the evidentiary history of this trial that the "condition or instrumentality" considered by the trial court in weighing substantial similarity was the collapse, or yield, of the NS seat that led to the fatal injury to young Joshua. Plaintiffs obtained through discovery a large number of documents from DCC related to hundreds of cases of failure of the NS seats involved in the Flax accident.⁸ The judge instructed Plaintiffs to narrow down the "other similar incidents" (OSI's) to only those which could be established as substantially similar to the Flax incident, specifically as to the type of seat involved, the type of accident (rear-end collisions), the degree of injury of the parties, and the force of the collision between the vehicles involved, or "Delta V."⁹

⁸ The Sharing Protective Order filed on August 6, 2002, dealt with the discovery of these documents.

⁹ At trial, plaintiff expert Kirk defined "Delta V" as follows:

Delta is a Greek symbol meaning change. Delta V means change in velocity. Also referred to as speed change or velocity change. In accident reconstruction we're generally talking about an impact.

In its efforts to determine which documents would be admitted, the trial court conducted several days of pre-trial conferences in which it allowed counsel for Plaintiffs to make a showing of substantial similarity of each incident to the Flax seat and incident, while allowing counsel for DCC to argue in support of their numerous motions in limine in support of excluding the documents concerning incidents that they believed to be dissimilar. By the time the trial began on November 2, 2004, the trial court had admitted into evidence 37 OSI's that were deemed substantially similar to the Flax incident.¹⁰

We find that the trial court did not abuse its discretion in allowing into evidence the 37 accidents designated as OSI's and submitted by Plaintiffs. The

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It's simply the change in the speed of the vehicle that occurs during an accident. It's a measure of impact severity.

In Kirk's estimation, based upon the damage to and position of the vehicles after the accident and from his own reconstruction, the Flax minivan had been traveling at between 10-15 miles per hour, and Stockell's truck had been traveling between 50-55 miles per hour at the time of collision. Kirk estimated the Delta V of the collision to be "[a]pproximately 17 to 19 miles per hour."

¹⁰ Upon this Court's review of the expansive record, we perceive the 37 incidents determined by the trial court to be substantially similar as: Amberson, Baird, Bajalia, Basa, Bennett, Berthelson, Bridwell, Buss, Butler, Chism, Collins, Cornelia, Corrigan, Crawford, Dize, Fortney, Hanifee, Henckel, Jones, Kinsey (Odyssey), Labelle, Martin, McCloskey, McCurdy, McMillan, McNeely, Middleton, Munoz, Neal, Persak, Prestridge, Rich, Robinson, Sauceda, Spires, Stanley, and Toothaker.

record reflects that the trial court devoted a considerable amount of time to allow counsel for both parties to voice their support for or objections to this evidence. It is practically indisputable that the injuries occurring in all 37 of these cases were caused by the backward motion of minivan seats, which Plaintiffs sufficiently showed, in each case, to be substantially similar to those at issue in the Sparkmans' vehicle. Therefore, with regard to the trial court's admission of these 37 other accidents as evidence of dangerousness of the NS seat, we affirm the trial court's rulings.¹¹

2. Exclusion of "Real-World" Accident Data

DCC also alleges that the trial court erred by refusing to admit, during Phase I, "real-world accident data," specifically data from a NHTSA-run system called "NASS," that would aid its case in showing the jury that rear-end fatalities such as the one in this case "are exceedingly rare and account for only 3 percent of all traffic crash fatalities." According to DCC's expert Mike James, "NASS is a system that is run by NHTSA, by the government agency, where they systematically investigate automobile accidents throughout the country for the

¹¹ All 37 of the OSI's, even those occurring after the purchase of the van in 1998 and the accident in 2001, were admissible as evidence of dangerousness of the NS seat. *Winfrey*, 19 Tenn. App. at 147, 83 S.W.2d at 905. However, we find that only 12 of the OSI's occurred prior to the purchase of the Caravan in May of 1998, and therefore only these 12 OSI's should have been admitted for the dual purpose of showing dangerousness and notice to DCC. In the next section, we discuss how the trial court's failure to provide a limiting instruction to this effect may have affected the jury in its finding of recklessness.

purpose of generating field accident data that can be used by researchers, both within the agency and other researchers[,] to evaluate how vehicles perform in real world accidents." Appellant's counsel made an offer of proof for this evidence before Phase I of the trial began. DCC argued in support of this evidence:

There is no need to prove substantial similarity. I think we all agree on that, unless you are going to offer it to prove the existence of defect or knowledge on the part of the defendant...

We have to show why we made the design choices that we made. And while plaintiffs want to focus on simply rear impacts that injured children, we don't have that luxury as the manufacturer and designer of these seats...

So Mr. James' statistical analysis is dissimilar on purpose because we have to show to the jury what kind of harm can happen to occupants in not just the accidents that plaintiffs focus on, rear impacts in which children are hurt, but why we chose the design we did because of the variety of accidents that can occur.

Mr. James is an engineer and he has participated in testing. He is entitled to say that the seats are not unreasonably dangerous and not in a defective condition. He is entitled to say that separate and apart from the

statistical analysis that he has undertaken - the statistical analysis simply goes to show the jury what kind of harm can occur in rear-end impacts, what kind of harm can occur in frontals, roll-overs, you name it, with whatever kind of occupant and whatever restraint situation you're talking about.

And why DaimlerChrysler decided that out of all of those accidents, the yielding seat produces less harm for occupants than a stiffer seat and that's why they made the design choice they did.

At this pre-trial conference, the trial court granted Plaintiffs' motion in limine to exclude the evidence, but allowed DCC the option of making another offer of proof during Phase E.

At trial, DCC called Mike James to the stand and sought to introduce evidence of the infrequency of vehicular fatalities from seat yielding in rear-end accidents, based upon a study that James had conducted through his analysis of the NASS database. During its direct examination of James, DCC made another offer of proof of the NASS data outside of the jury's presence. During Plaintiffs' cross examination of James, the following exchange occurred:

Q. Have defense counsel told you that Judge Gayden has already laid down the parameters touched on for what is or is not substantially similar for this trial?

A. No.

Q. So you haven't even discussed that with defense counsel?

A. No. I was told that my analysis of the NASS data was not allowed in.

Q. You're proposing to show this jury some charts based upon other wrecks, and you have not even discussed with defense counsel what the Court has already ruled with respect to what has to be proved before you can talk about other wrecks in this trial? You didn't even talk about that?

A. I have not had a discussion about any type of ruling as to what constitutes substantially similar.

The NASS database upon which James relied upon for his statistical studies contained, by his assessment, in the range of 100,000 different accidents of all types, not just rear-end accidents, involving all types of vehicles.

Neither party has cited to a case in Tennessee state courts in which the parameters have been established for a defendant to introduce the absence or infrequency of accidents as being relevant to the existence or nonexistence of a dangerousness or defect, or as having a bearing on the rationale of a manufacturer for choosing certain design requirements over others. The Sixth Circuit, however, has stated:

The lack of prior accidents or claims may be admissible to prove the following: (1) the absence of the defect or condition alleged; (2) the lack of a

causal relationship between the injury and the defect or condition charged; (3) the nonexistence of an unduly dangerous situation; or (4) want of knowledge (or of grounds to realize) the danger.

Hines v. Joy Mfg. Co., 850 F.2d 1146, 1154 (6th Cir. 1988) (citing E. Cleary, MCCORMICK ON EVIDENCE § 200 (3d ed. 1984)).

DCC did not specifically articulate any of these reasons for admitting the NASS data in either of its offers of proof at trial, but rather attempted to have the evidence admitted to illustrate the enormous number of variables that a manufacturer must consider when making safety design choices. Ultimately, the trial court stated that the evidence was "just too broad to be relevant" in Phase One. Once again, with regard to our standard of review when considering a trial court's decisions related to evidentiary matters, our supreme court has held:

In Tennessee[,] admissibility of evidence is within the sound discretion of the trial judge. When arriving at a determination to admit or exclude even that evidence which is considered relevant[,] trial courts are generally accorded a wide degree of latitude and will only be overturned on appeal where there is a showing of abuse of discretion.

Otis v. Cambridge Mut. Fire Ins. Co., 850 S.W.2d 439, 442 (Tenn. 1992). We believe that this determination did not constitute an abuse of discretion, and therefore we affirm the decision of the court below to exclude this evidence.

3. DCC's Motion for a New Trial Based Upon Discovery Abuse

DCC moves this Court for a new trial based upon discovery abuse by Plaintiffs in their failing to disclose results from sled tests run on the DCC RS seat in 2002 by their expert witness, Dr. Kenneth Saczalski, during his involvement in a different case against the company. DCC did not discover these results until after trial, and it moved for a new trial. The trial court, in its post-trial memorandum decision, found that Saczalski had admitted in a deposition for another case that during his testing of the Sebring seats, under similar conditions as the accident in the Flax case, "the dummy in the RS dual recliner seat had made contact with the 3-year old surrogate dummy." The trial court found that "Plaintiffs did not disclose a series of RS sled tests conducted by Dr. Saczalski to Defendant DaimlerChrysler." The trial court stated: "The Court finds that the focal point for the discovery abuse was whether or not there was a reasonable alternative to the NS minivan seat. The fact is that DaimlerChrysler manufactured a safer alternative to the NS seat in the Chrysler Sebring vehicle." The court nonetheless sanctioned Plaintiffs under Rule 37 of the Tennessee Rules of Civil Procedure for abuse of the discovery process, denying Plaintiffs "any and all discretionary costs for failing to discover the RS sled tests conducted by Dr. Saczalski in the Neal case[]," but denied DCC's motion for a new trial, finding that "discovery of the RS sled tests would not have affected the outcome of the trial."

"Unless otherwise required by statute, review of findings of fact by the trial court in civil actions shall be *de novo* upon the record of the trial court.

accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise." TENN. R. APP. P. 13(d). "A new trial will be granted on account of newly discovered evidence only when it is evident that an injustice has been done and a new trial will change the result." *McCollum v. Huffstutter*, No. M2002-00051-C0A-R3-CV, 2002 Tenn. App. LEXIS 711, at * 19 (Tenn. Ct. App. Oct. 8, 2002). In ruling on a motion for new trial on the grounds of newly discovered evidence, the trial court is vested with wide discretion and its denial of such a motion will not be disturbed by an appellate court unless it has abused its discretion. *Id.* (citing *Evans v. Evans*, 558 S.W.2d 851, 853 (Tenn. Ct. App. 1977)).

Aside from the implausible notion that a corporation of DaimlerChrysler's size and reputation would need to rely upon crash tests conducted by an individual plaintiff's expert in order to facilitate a fully informed preparation of its case, we find DCC's arguments in support of a new trial on this issue to be without merit. Although Plaintiffs did argue that the dual recliner RS design was stronger than that of the NS at issue in this case, their expert Saczalski testified that, in his opinion, these seats were still defective:

By Mr. Sutter:

Q. Sir, are you endorsing every one of the seats set forth in paragraph 48 [which includes the 2001 RS seat] of your affidavit as nondefective?

A. No, I didn't say that. I said that those would change the outcome to Joshua Flax based on my analysis and testing.

Q. They are still defective though?

A. Yes. In my opinion, they don't provide enough protection for the larger number of people in the population and other more severe accidents than what we have here in Flax.

The 1996 Sebring and the 1998 Ram "belt integrated seat" design was the feasible alternative that Plaintiffs advocated, because unlike the RS seats, these seats were much stiffer and did not "collapse rearward, endangering rear seat occupants."

We agree with the trial court's finding that, regardless of the performance of the RS seats that were added to DCC minivans in 2001, there was a safer alternative design to the NS seat in the 1996 Sebring seat. Testimony provided by DCC's own experts and internal corporate documents admitted into evidence suggest that the company was aware that their own Sebring seats performed better than the NS seats in rear-end crash tests. For example, a 1996 document detailing rear-end crash test results of the Sebring seats by Chrysler's Seat Tech Club stated, "[t]he front seats have performed very well in impact tests, including rearward directions." Neville D'Souza provided testimony, regarding his preparation of a document that compared the performance of DCC seats compared to seats of other companies, which corroborated this assertion upon examination by Plaintiffs' counsel:

Q. And under '96 JX, that's the Sebring; is that correct?

A. Yes.

Q. That's the vehicle that has the all-belts-to-seats design?

A. Yes.

Q. You've written meets dynamic requirements; right?

A. Yes.

Q. But under '96 NS, which is the minivan; correct?

A. Yes.

Q. There is a blank; correct?

A. Yes.

During cross-examination of defense expert David Blaisdell at trial, he admitted the following in response to Plaintiffs' counsel's description of the Sebring seat performance:

Q. You've looked at the Sebring seat test and they don't yield or recline into the rear compartment of the passenger compartment; correct, sir?

A. At their Delta V of 15 or 16 that they were tested at, that's correct.

Q. And the Sebring belt-to-seat seat I believe you testified in static test would test out at some 40 to 50,000 inch pounds;¹² correct, sir?

¹² This is in stark contrast to the performance of the NS seats, which tested at between 7,000 and 8,200 pounds per inch of torque.

A. That's probably right.

DCC's other expert witness, Mike James, testified on cross-examination as follows:

Q. Now, isn't it true, sir, that in your opinion if DaimlerChrysler Corporation had put stronger front seats in Jim and Sandra Sparkman's 1998 Dodge Caravan like the Sebring seats, Joshua Flax would be alive today?

A. I don't think he would have had this injury in this accident. I guess I can't testify to what would happen otherwise.

Q. That's fair enough. If DaimlerChrysler had put in the Sparkmans' Dodge Caravan stronger seats like it already had, Joshua Flax would have had no injury in this wreck; isn't that true?

A. Right. There would have been different injuries and different accidents, but it wouldn't have been this injury in this accident.

We find that the evidence preponderates in favor of the trial court's finding that DCC manufactured a safer alternative to the NS seat in the 1996 Sebring. Therefore, we believe that the discovery of the RS tests would not have affected the outcome of this trial, as the RS seat was not Plaintiffs' most preferred design. We find that the trial court's resolution of this issue, in denying Plaintiffs discretionary costs as a sanction, was an appropriate

use of discretion. We affirm the trial court's denial of DCC's motion for a new trial on this issue.

E. Evidence Supporting a Finding of Recklessness

DCC challenges the substantial award for punitive damages under several theories of error. Appellant asserts that its conduct in designing, marketing, and testing its NS seats does not meet the requisite standard for imposing punitive damages in Tennessee, which is the case "involving only the most egregious of wrongs." Appellants challenge the finding of recklessness by the jury in their Phase I verdict, claiming that the record does not support a finding of clear and convincing evidence of conscious wrongdoing. DCC alleges that the Plaintiffs' position, that DCC knew that the NS seats were dangerous to certain passengers in certain accidents, and that differently designed seats were available to DCC and would have been safer in these accidents, ignores the multitude of concerns that its engineers must address when creating a product that will provide the most safety to its consumers. DCC points to the fact that its NS seats exceeded the federal safety standards established by NHTSA for seat strength in accidents, and that this further illustrates the lack of reprehensible conduct that would warrant punitive damages. DCC also challenges the trial court's handling of the post-sale failure to warn claim as it was presented to the jury. Appellant notes that this product liability tort has not been adopted in Tennessee, and that the jury should have not been instructed to consider it prior to its deliberation at the end of Phase I of the trial.

In 1992, the Tennessee Supreme Court set forth the standard that must be met in order for punitive

damages to be imposed against a defendant. *See Hedges v. S.C. Toof and Co.*, 833 S.W.2d 896 (Tenn. 1992). *Hedges* stated that in Tennessee, "a court may henceforth award punitive damages if it finds a defendant has acted either (1) intentionally, (2) fraudulently, (3) maliciously, or (4) recklessly." *Id.* at 901. Furthermore, the court held that "because punitive damages are to be awarded only in the most egregious of cases, a plaintiff must prove the defendant's intentional, fraudulent, malicious, or reckless conduct by *clear and convincing evidence*." *Id.* (emphasis added) The reasoning provided by the court in establishing this higher standard of proof was to further the underlying purposes of punitive damages, these being punishment and deterrence, and the court stated: "fairness requires that a defendant's wrong be clearly established before punishment, as such, is imposed; awarding punitive damages only in clearly appropriate cases better effects deterrence." *Id.* The *Hedges* court went on to explain the trial court's duties in reviewing a punitive award:

After a jury has made an award of punitive damages, the trial judge shall review the award, giving consideration to all matters on which the jury is required to be instructed. The judge shall clearly set forth the reasons for decreasing or approving all punitive awards in findings of fact and conclusions of law demonstrating a consideration of all factors on which the jury is instructed.

Id. at 902.

The *Hodges* court defined reckless conduct as taking place when a person "is aware of, but consciously disregards, a substantial and unjustifiable risk of such a nature that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances." *Id.* (citing T.C.A. § 39-11-302(c) (1991) (criminal definition of recklessness)). "It takes something far greater than lack of ordinary care to sustain an award for punitive damages." *Richardson v. Gibalski*, 625 S.W.2d 715, 717 (Tenn. Ct. App. 1979); *see also Nelms v. Walgreen Co.*, C.A. No. 02A01-9805-CV-00137, 1999 Tenn. App. LEXIS 437, (Tenn. Ct. App. July 7, 1999) (affirming the trial court's ruling that although the evidence "clearly supported a claim of ordinary negligence, the evidence did not support a finding that [defendant pharmacists] engaged in reckless conduct such as to constitute a gross deviation from the required standard of care"); *Anthony v. Construction Products, Inc.*, 677 S.W.2d 4, 9 (Tenn. Ct. App. 1984) (finding that, although the proof introduced was sufficient to create an issue for the jury as to whether a defendant exercised reasonable and ordinary care, the record did not support an award of punitive damages based on recklessness).

It has been established that, under Tennessee law, "a product liability claimant who presents sufficient evidence to satisfy the Tennessee standard for receiving punitive damages will not be foreclosed from such a recovery simply because his cause of action is founded upon a theory of products liability . . ." *Cathey v. Johns-Manville Sales Corp.*, 776 F.2d 1565, 1570 (6th Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986); *see also First Nat'l. Bank v. Brooks Farms*, 821 S.W.2d 925, 926 (Tenn. 1991).

In explaining our standard of review for issues of fact that require "clear and convincing" proof, this Court has held:

Our review of a judgment based upon a jury verdict is governed by Rule 13(d), Tennessee Rules of Appellate Procedure. Findings of fact by a jury in civil actions shall be set aside only if there is no material evidence to support the verdict. We note, however, that there is a substantial body of case law that, as a matter of law, requires certain facts be established by clear, cogent and convincing evidence . . . We will, therefore, when we reach issues requiring the evidence to be clear, cogent and convincing, examine the record to determine if there is sufficient proof to constitute clear, cogent and convincing evidence to support the findings of the jury.

Shell v. Law, 935 S.W.2d 402, 405 (Tenn. Ct. App. 1996) (emphasis added). In another decision by this Court, we stated:

Whether the "clear, cogent and convincing evidence" standard is imposed by statute or under the common law and whether the trial is by jury or the trial judge sitting without a jury, appellate courts are required to determine from the record whether or not the party bearing the burden of proof has established that his factual contentions are "highly probable." *Colorado v. New Mexico*, 467 U.S. 310,

315, 104 S. Ct. 2433, 2437-38, 81 L. Ed. 2d 247 (1984); *Estate of Acuff v. O'Linger*, 56 S.W.3d 527, 533-537 (Tenn. Ct. App. 2001); *Shell v. Law*, 935 S.W.2d 402, 405 (Tenn. Ct. App. 1996).

State v. Layne, No. M2001-00652-00A-R3-1V, 2002 Tenn. App. LEXIS 78, at *17-18 (Tenn. Ct. App. Feb. 1, 2002) (emphasis added); *see also Shahrdar v. Global Hous., Inc.*, 983 S.W.2d 230, 238-39 (Tenn. Ct. App. 1998) (citing *Shell*, 935 S.W.2d at 405) (“In reviewing a jury verdict where the standard of proof required is clear and convincing evidence, this Court must examine the record to determine if there is clear, cogent and convincing evidence to support the findings of the jury.”). “In contrast to the preponderance of the evidence standard, clear and convincing evidence should demonstrate that the truth of the facts asserted is ‘highly probable’ as opposed to merely ‘more probable’ than not.” *In re C.W.W.*, 37 S.W.3d 467, 474 (Tenn. Ct. App. 2000) (citing *Lettner v. Plummer*, 559 S.W.2d 785, 787 (Tenn. 1977); *Goldsmith v. Roberts*, 622 S.W.2d 438, 441 (Tenn. App. 1981); *Brandon v. Wright*, 838 S.W.2d 532, 536 (Tenn. Ct. App. 1992)). “In order to be clear and convincing, evidence must eliminate any serious or substantial doubt about the correctness of the conclusions to be drawn from the evidence.” *Id.* (quoting *Hodges*, 833 S.W.2d at 901, n.3).

The verdict form supplied to the jury prior to its Phase One deliberation dealt with the issue of punitive damages by posing the following question: “Do you find, by clear and convincing evidence, that DaimlerChrysler Corporation acted recklessly with regard to the conduct on which you base your finding of liability such that punitive damages shall be

awarded against DaimlerChrysler Corporation?" In response to DCC's post trial motions for judgment on the issue of punitive damages, the trial court articulated its findings supporting the award in its June 23, 2005 revised order entitled "Punitive Damages: Findings of Fact and Conclusions of Law."

We believe that the evidence on the record does not support a clear and convincing showing of the requisite recklessness necessary to impose punitive damages under Hodges, for several reasons.

First, it appears to be undisputed that DaimlerChrysler's NS minivan seats drastically exceeded the standard set by the federal government and required of manufacturers. Appellees argue that DCC's compliance with FMVSS 207 is not enough to protect it from a finding of recklessness, because it is merely a "minimum" standard, and one which DCC and testifying witnesses knew to be "inadequate" for testing rear-end accidents. However FMVSS 207 set the strength requirement of seats in stationary rear-end accidents at 3,300 inch-pounds of torque, and even according to expert Saczalski's testimony on cross-examination, the NS seats tested at more than twice this standard:

- Q. Sir, is it true or not that DaimlerChrysler on their own set their internal goals well above, almost double the standard?
- A. As far as seat strength, static seat strength
- Q. Yes.
- A. - yeah, they did that.

Q. The standard was 3,300 pounds and DaimlerChrysler on their own with no government forcing them to do it, increased it to almost 7,000 pounds or 6,600, somewhere in there?

A. Correct.

Q. When DaimlerChrysler manufactured the seats, they met and surpassed their own internal goal of 6,500 or so pounds; correct?

A. Correct.

Q. And this seat has been tested between 7,000 and 8,200 pounds; correct?

A. Yes. Inch pounds of torque. Inch pounds of torque.

Dr. Saczalski further agreed that the NS seat nearly doubled every standard for seat back strength in the world.

T.C.A. § 29-28-104 (2006) provides:

Compliance by a manufacturer or seller with any federal or state statute or administrative regulation existing at the time a product was manufactured and prescribing standards for design, inspection, testing, manufacture, labeling, warning or instructions for use of a product, shall raise a rebuttable presumption that the product is not in an unreasonably dangerous condition in regard to matters covered by these standards.

As the issues are not presented on appeal, we are not compelled to review the jury's finding of liability against DCC on Plaintiffs' claims under strict liability and negligence. Assuming that the jury found that the presumption against an unreasonably dangerous product was sufficiently rebutted by Plaintiffs' presentation of evidence of trial, however, we cannot ignore that our legislature has afforded a presumption against an unreasonably dangerous product to manufacturers when the product complies with relevant government regulations through its enactment of T.C.A. § 29-28-104. We believe that DCC's compliance with FMVSS 207 weighs heavily in Appellant's favor against a clear and convincing finding of recklessness that might warrant punitive damages.

Furthermore, while DCC might have had notice of possible hazards to children seated behind the NS seats in rear-end accidents, a strong majority¹³ of the 37 "other similar incidents," which the trial court allowed into evidence as relevant to either notice by DCC or to dangerousness or defect, occurred *after* the Sparkmans had purchased their Caravan in May of 1998.¹⁴ The timing of these incidents was a point of

¹³ Our review of the 37 other similar incidents admitted into evidence by the trial court leads us to conclude that only 12 of these occurred prior to the purchase of the 1998 Caravan by the Sparkmans. These incidents were: Baird, Bajalia, Butler, Corrigan, Dize, Fortney, McCloskey, McNeely, Middleton, Persak, Robinson, and Sauceda.

¹⁴ We are unable to find within the record a specific date on which the Sparkman purchased the 1998 Caravan. However, the parties appear to have agreed that the purchase occurred in May of 1998.

contention throughout both the discovery process and the trial itself, but the trial court communicated to the parties that it was allowing the 37 substantially similar "OSI's" into evidence as being probative of notice to DCC, and as proof of a defective or unreasonably dangerous condition. As we discussed in the previous section, Tennessee law allows "other accident" evidence to be admitted for this dual purpose, and these 37 incidents were properly admitted as relevant to dangerousness. However, since this state has not yet adopted a post-sale duty upon manufacturers to warn of defective or unreasonably dangerous products, the jury should not have been permitted to consider the OSI's occurring after May 1998 as establishing notice to DCC of injuries from NS seats.

While DCC requested a Phase I jury instruction stating "You may not award punitive damages based on a finding that [DCC] failed to provide a post-sale warning to Plaintiffs," the trial court did not provide such an instruction. The Phase I instruction regarding a post-sale duty to warn was as follows:

A reasonable person in the manufacturer's position would provide a warning after the time of sale if, one, the seller knows or reasonably should know the product poses a substantial risk of harm to persons or property; and two, those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and three, a warning can be effectively communicated to and acted upon by those to whom the warning might be provided; and three,

[sic] the risk of harm is sufficiently great to justify the burden of proving a warning.

The trial court waited until Phase II, after punitive liability through recklessness had already been found, to provide the jury with the following instruction: "I instruct you that the plaintiffs are not seeking punitive damages based upon and you must not award punitive damages based upon the conduct of DaimlerChrysler underlying plaintiffs' post-sale duty to warn claim."

The trial court subsequently did not provide the jury with an instruction that limited its consideration of the similar incidents, as they related to notice or knowledge of defect, to those incidents occurring prior to the Sparkmans' purchase of the Caravan:

The law provides evidence of similar incidents involving the product at issue in this case may be admissible and may be considered for the limited purpose of showing, if it does, the product manufacturer's knowledge or notice of the alleged product defects.

You may consider this evidence only if the similar incidents are similar or substantially similar in terms of the allegation of defect or failure to the design defect or product failure alleged in this case.

By this instruction, the Court does not express any opinion as to whether the product manufacturer has

had any similar incidents. This is a matter solely for your determination.

If you believe such has been proven, however, you are strictly limited in your consideration of the similar incidents evidence as it relates to the defective product manufacturer's knowledge or notice of the alleged defect.

While we recognize the trial court's patience throughout the trial in dealing with the voluminous evidence of other accidents tendered by Plaintiffs, as well as its thorough efforts to determine which incidents Tennessee law would treat as substantially similar, we find error in the court's failure to instruct the jury that only those injuries involving NS seats which occurred prior to May 1998 could rationally be considered to have imparted notice to DCC.

In light of these considerations, we cannot say that the 12 admitted OSI's occurring prior to the Sparkmans' purchase of the 1998 Caravan clearly and convincingly placed Appellant on such a high degree of notice as to characterize its failure to replace the seats, warn potential buyers of the danger, or otherwise address the issue, as sufficiently reckless behavior to warrant punitive damages under *Hodges*. While the jury could properly have considered all 37 OSI's as being probative of the dangerousness of the NS seat design, only 12 of the incidents allowed into evidence by the trial court could have been known to DCC prior to the purchase of the Sparkman's Caravan.

Further evidence from the record suggests that the loading strength of the NS seat was comparable to that of the seats of other manufacturers whose

minivans were offered for sale in the United States at the time. Under cross-examination at trial, Plaintiffs' expert Saczalski answered questions regarding his deposition responses in the case as follows:

Q. You might want to go to page 125 line 3.

[reading deposition] Question: At the time of this accident, was [sic] there any other minivans on the market that you believe would have produced a different outcome from Joshua Flax? Answer: Yes. Question: Can you identify those. Answer: The Mercedes-Benz that I showed you earlier, the V class in Europe.

You go on to say that it wasn't available in the United States at the time, and then you talk about the ML 320.

A. Correct.

Q. All right. Now, the ML 320, the minivan that – or the V class that you're talking about, that was that back-to-back minivan that was up very briefly yesterday; correct?

A. Right. Those seats could either be put in back to back or they could be put this [sic] all forward facing.

Q. Not available in the United States at that time? Correct?

A. That was not available at that time, correct.

Q. The ML 320 is actually an SUV; is it not?

A. Yes.

Q. It is not a minivan?

A. Correct.

Q. There were no minivans for sale in the United States in 1998 that had seats that were substantially different than the ones in this particular vehicle, were there, sir?

A. There was, yes. And it was unfortunate that I omitted it, but the Astro van seat carried about 1,800 pounds of load which would be about two and a half times what we have here.

Q. You were asked those same questions under oath and you did not tell us that then, did you, sir?

A. I inadvertently failed to remember that test.

Q. And that was in June of 2004?

A. Correct.

Q. Isn't it true that in 1998 most vehicles on the road probably had a single-sided recliner - I'm sorry, were probably single-sided recliner seats that were tested in the range of about 700 pounds?

A. Most seats were single-sided recliner at that time, but 700 pounds is about the average, so that's not - there were single-sided recliners that were stronger than that and there were some that were weaker than that. This seat kind of fit in the middle. So most vehicles on the road weren't all 700. That happened to be about the average for the single-sided recliners.

Q. So this vehicle was in the average of the predominant number of vehicles on the road?

A. Yes. What I tested.

From this testimony, it is apparent that Saczalski could identify only one type of minivan offered for sale in the United States in 1998 that had substantially different seats from the NS seat in terms of loading strength. Since Tennessee law allows for a jury to consider industry customs and standards in determining whether a product is defective or unreasonably dangerous,¹⁵ we believe

¹⁵ T.C.A. § 29-28-105(b) (2006) provides, in part:

29-28-105. Determination of defective or dangerous condition.

(a) A manufacturer or seller of a product shall not be liable for any injury to a person or property caused by the product unless the product is determined to be in a defective condition or unreasonably dangerous at the time it left the control of the manufacturer or seller.

that such considerations are similarly relevant when determining whether a manufacturer's conduct is reckless.

In *Jarmakowicz v. Suddarth*, No. M1998-00920-COA-R3-CV, 2001 Tenn. App. LEXIS 125 (Tenn. Ct. App. Feb. 21, 2001), we stated:

This court has recognized the appropriateness of a directed verdict on punitive damages while allowing the jury to determine liability and award compensatory damages on the basis of the higher burden of proof required to support punitive damages and on the basis of the differing character of conduct necessary to meet the Supreme Court's requirement that only the most egregious conduct warrants punitive damages. See, e.g., *Nelms v. Walgreen Co.*, 1999 Tenn. App. LEXIS 437, No. 02 A01-9805-CV-00137, 1999 WL 462145 at *2-4 (Tenn. Ct. App. July 7, 1999) (no Tenn. R. App. P. 11 application filed)

[Footnote continued from previous page]

(b) In making this determination, the state of scientific and technological knowledge available to the manufacturer or seller at the time the product was placed on the market, rather than at the time of injury, is applicable. *Consideration is given also to the customary designs, methods, standards and techniques of manufacturing, inspecting and testing by other manufacturers or sellers of similar products.*

(emphasis added)

(plaintiff failed to prove by clear and convincing evidence that defendant acted recklessly although plaintiff established negligence by a preponderance of the evidence, and the trial court properly directed a verdict for the defendant on punitive damages at the close of the proof).

When a court is called upon to determine a motion for directed verdict on punitive damages, the court is "required to determine whether there was material evidence of a clear and convincing nature to support an award of punitive damages," while still taking the strongest legitimate view of plaintiffs evidence. [*Wasielewski v. K Mart Corp.*, 891 S.W.2d 916, 919 (Tenn. Ct. App. 1994)].

When considering a motion for directed verdict on punitive damages, a trial court must limit consideration of the evidence in light of this standard, but it must also find the evidence to be clear and convincing.

Jarmakowicz, 2001 Tenn. App. LEXIS 125, at *41-42 (citing *Hughes v. Lumbermens Mut. Cas. Co., Inc.*, 2 S.W.3d 218, 227). Given the evidence offered by Plaintiffs at trial, we believe the trial court should have granted DCC's motion for directed verdict on the issue of liability for punitive damages. While there may be material evidence to support a jury finding of negligence, as well as a defective or unreasonably dangerous product, the culpability attributed to DCC in this case does not clearly and

convincingly approach the "egregious" standard mandated by *Hodes* for allowing punitive damages. For these reasons, the punitive damage awards under both the wrongful death and NIED theories are reversed.

F. Amount of Damages

Finally, Appellants allege that the compensatory awards and the punitive award, which was significantly remitted by the trial court, were excessive and require a remittitur by this Court. As we have already held that punitive damages should not have been imposed based upon the evidence presented at trial, the issue of an excessive punitive award is pretermitted. Similarly, because we have ruled that plaintiff Sparkman did not offer expert proof of serious or severe emotional distress and therefore did not satisfy the *prima facie* case for a negligent infliction of emotional distress claim, this portion of the compensatory award against DCC is reversed, and Appellant's challenge to this amount as excessive is also pretermitted. We are, therefore, left to address DCC's challenge to the \$5 million wrongful death award to the parents of Joshua as being excessive.

Appellant contends, for the first time on appeal, that the \$5 million wrongful death award is excessive. DCC argues that Plaintiffs' expert testified that the present value of Joshua's lost income was \$1.3 million, and that the remaining \$3.7 million of the compensatory award, representing pain and suffering of Joshua and loss of filial consortium by his parents, "is excessive on its face, and was then duplicated in the punitive award." DCC asks that this Court remit the compensatory damage award for these reasons.

We must recognize that Appellant never challenged the amount of the compensatory award in the trial court, nor did they contest their own liability to Plaintiffs on the negligence or strict liability theories underlying the wrongful death claim. Issues not raised in the trial court cannot be raised for the first time on appeal. *Barnes v. Barnes*, 193 S.W.3d 495 (Tenn. 2006) (citing *Simpson v. Frontier Cnty. Credit Union*, 810 S.W.2d 147, 153 (Tenn. 1991)); *Knoxville's Comty. Dev. Corp. v. Wright*, 600 S.W.2d 745 (Tenn. Ct. App. 1980). Therefore, we affirm the trial court's entry of judgment for \$5 million in compensatory damages for the wrongful death of Joshua Flax, the liability for which was apportioned by the jury to be 50% as to each defendant, DCC and Stockell.

IV. CONCLUSION

For the foregoing reasons, we affirm in part and reverse in part the judgment of the trial court. We affirm the trial court's denial of DCC's motion for a new trial based upon the *ad damnum* clause issue and the evidentiary issues. As Ms. Sparkman's proof at trial did not satisfy the heightened requirements for a stand-alone negligent infliction of emotional distress claim in Tennessee under *Camper*, the award corresponding with this claim is reversed as to defendant DCC, and affirmed as to defendant Stockell, who did not participate in the trial or this appeal. The remaining judgment entered for \$5 million in compensatory damages for wrongful death is affirmed as apportioned by the jury against both DCC and Stockell. The remitted \$20 million judgment for punitive damages is reversed. Costs are to be assessed one-half to Appellant, DaimlerChrysler Corporation and its surety, and

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one-half to Appellees, Jeremy Flax and Rachel Sparkman, for which execution may issue if necessary.

/s/
ALAN E. HIGHERS,
JUDGE

APPENDIX C

IN THE FIRST CIRCUIT
COURT FOR DAVIDSON COUNTY
TENNESSEE

CIVIL ACTION NO. 02C-1288

JEREMY FLAX and RACHEL SPARKMAN, as
the Natural Parents of Joshua Flax, deceased; and
RACHEL SPARKMAN, individually; and JEREMY
FLAX, individually

Plaintiffs,

vs.

DAIMLERCHRYSLER CORPORATION and
LOUIS A. STOCKELL, JR.,

Defendants.

FINAL ORDER AND JUDGMENT

This cause came on for trial on the 1st of November 2004, before a jury and the Honorable Hamilton V. Gayden, Jr., Judge of the First Circuit Court of Davidson County, Tennessee. On November 22, 2004, the jury returned a verdict for Phase I of the trial. A copy of that verdict is attached as Exhibit 1. On November 23, 2004, the jury returned a verdict for Phase II of the trial. A copy of that verdict is attached as Exhibit 2.

The Court entered its original Judgment on December 21, 2004. On January 7, 2005, the Court, *sua sponte*, set aside that Judgment in order to file the Court's independent written findings of fact and conclusions of law, relating to the punitive damages awards, in accordance with Hodges v. Toof, 833 S.W.2d 896 (Tenn. 1992). The Court also directed the attorneys to submit proposed findings of fact and conclusions of law within two weeks of the January 7, 2005, Order. Plaintiffs and Defendant DaimlerChrysler Corporation submitted Proposed Findings of Fact and Conclusions of Law as directed. Post-Trial Motions were also filed by plaintiffs and defendant DaimlerChrysler Corporation.

The Court heard initial argument from the parties on post-trial motions and on the Proposed Findings of Fact and Conclusions of Law on March 18, 2005, and the Court heard further argument on those matters on June 9, 2005. After considering all of the filings and argument and the entire record in this cause, the Court issued on June 20, 2005, a Memorandum entitled *Punitive Damages: Findings of Fact and Conclusions of Law*, and on June 23, 2005, a Memorandum entitled *Revised Punitive Damages: Findings of Fact and Conclusions of Law*. The Court directed counsel for the plaintiffs to prepare a Final Order based upon this Memorandum, as revised.

By Memorandum Decision: Motion for JNOV or, In The Alternative, For New Trial entered on June 20, 2005, and *Revised* Memorandum Decision: Motion for JNOV or, In The Alternative, For New Trial entered on June 23, 2005, the Court also ruled on all post-trial motions.

Pursuant to T.C.A. § 20-10-102, by filing dated July 5, 2005, plaintiffs accepted under protest the Court's suggestion of remittitur of the total punitive damages assessed against defendant DaimlerChrysler to the sum of \$20 million (Twenty Million Dollars) as set forth in the Memorandum entitled Revised Punitive Damages: Findings of Fact and Conclusions of Law and in the Revised Memorandum Decision: Motion for JNOV or, In The Alternative, For New Trial.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

1. The Court having independently reviewed the evidence relevant to the issues and being satisfied with and approving the verdict as set forth in the Court's Revised Memorandum Decision: Motion for JNOV, or, In The Alternative, For New Trial, of June 23, 2005, the Court's Revised Memorandum Decision be and hereby is incorporated herein by reference and made a part of this Final Order.
2. The Court having independently reviewed the punitive damages awards and having given consideration to all matters on which the jury is required to be instructed, as set forth in the Court's Memorandum entitled Revised Punitive Damages: Findings of Fact and Conclusions of Law of June 23, 2005, that Revised Memorandum be and hereby is incorporated herein by reference and made a part of this Final Order;
3. Having been advised by the filing of a notice pleading submitted by the plaintiffs entitled Plaintiffs' Acceptance Under Protest of the Trial Court's Suggestion of Remittitur of the Total Punitive Damages Assessed Against Defendant DaimlerChrysler to the Sum of \$20 million (Twenty

Million Dollars), the Court hereby makes the acceptance under protest of the remittitur a part of this Final Order. The Court further finds that the jury's percentage allocation of its punitive damages awards to be fairly done in accordance with the evidence and the applicable federal and state law. Therefore, the remitted total of \$20 million in punitive damages shall be divided between the two claims on the same percentage basis the jury divided its original total award of punitive damages. Thus the jury's original award of \$65.5 million for punitive damages against DaimlerChrysler to plaintiffs Jeremy Flax and Rachel Sparkman, as the Natural Parents of Joshua Flax, deceased, for the wrongful death of Joshua Flax is accordingly remitted under protest to \$13,367,345.00 (Thirteen Million Three Hundred Sixty-Seven Thousand Three Hundred Forty-Five Dollars). The jury's original award of \$32.5 million for punitive damages against DaimlerChrysler to plaintiff Rachel Sparkman, individually, for negligent infliction of emotional distress to Rachel Sparkman is accordingly remitted under protest to \$6,632,655.00 (Six Million Six Hundred Thirty-Two Thousand Six Hundred Fifty-Five Dollars).

4. Based on the foregoing, it is further ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

A. Judgment be and is hereby entered in favor of the Plaintiffs Jeremy Flax and Rachel Sparkman, as the Natural Parents of Joshua Flax, deceased, in the amount of \$2,500,000.00 (Two Million Five Hundred Thousand Dollars) against DaimlerChrysler

Corporation for compensatory damages for the wrongful death of Joshua Flax;

- B. Judgment be and is hereby entered in favor of the Plaintiffs Jeremy Flax and Rachel Sparkman, as the Natural Parents of Joshua Flax, deceased, in the amount of \$2,500,000.00 (Two Million Five Hundred Thousand Dollars) against Louis A. Stockell, Jr. for compensatory damages for the wrongful death of Joshua Flax;
- C. Judgment be and is hereby entered in favor of the Plaintiff Rachel Sparkman, individually, in the amount of \$1,250,000.00 (One Million Two Hundred Fifty Thousand Dollars) against DaimlerChrysler Corporation for compensatory damages for negligent infliction of emotional distress;
- D. Judgment be and is hereby entered in favor of the Plaintiff Rachel Sparkman, individually, in the amount of \$1,250,000.00 (One Million Two Hundred Fifty Thousand Dollars) against Louis A. Stockell, Jr. for compensatory damages for negligent infliction of emotional distress;
- E. Judgment be and is hereby entered in favor of the Plaintiffs Jeremy Flax and Rachel Sparkman, as the Natural Parents of Joshua Flax, deceased, in the amount of \$13,367,345.00 (Thirteen Million Three Hundred Sixty-seven Thousand Three Hundred Forty-Five Dollars) against DaimlerChrysler Corporation for punitive damages for the wrongful death of Joshua Flax;

- F. Judgment be and is hereby entered in favor of the Plaintiff Rachel Sparkman, individually, in the amount of \$6,632,655.00 (Six Million Six Hundred Thirty-Two Thousand Six Hundred Fifty-Five Dollars) against DaimlerChrysler Corporation for punitive damages for negligent infliction of emotional distress to Rachel Sparkman;
- G. Pursuant to T.C.A. §47-14-122, this Judgment shall bear interest at the legal rate of 10% per annum from November 23, 2004, the date the jury's final verdict was returned;
- H. The Court costs assessed by the Clerk be and hereby are divided between Defendant DaimlerChrysler Corporation and the Defendant Louis A. Stockell, Jr., with each Defendant responsible for fifty percent (50%) of the total Court costs assessed by the Clerk. Execution may issue if necessary; and,
- I. This is a final Order and there is no just cause for delay.

ENTERED this _____ day of _____, 2005.

HONORABLE HAMILTON V.
GAYDEN, JR. CIRCUIT JUDGE

EXHIBIT 1
IN THE CIRCUIT
COURT FOR DAVIDSON COUNTY
TENNESSEE

CIVIL ACTION NO. 02C-1288

JEREMY FLAX and RACHEL SPARKMAN, as
the Natural Parents of Joshua Flax, deceased; and
RACHEL SPARKMAN, individually;

Plaintiffs,

vs.

DAIMLERCHRYSLER CORPORATION and
LOUIS A. STOCKELL, JR.,

Defendants.

VERDICT FORM

We, the jury, unanimously answer the questions
submitted by the Court as follows:

1. A. Do you find the defendant
DaimlerChrysler Corporation to be at
fault on Plaintiffs' claim that the product
was defective?

Yes X No _____

B. Do you find the defendant
DaimlerChrysler Corporation to be at
fault on Plaintiffs' claim that the product
was unreasonably dangerous?

Yes X No _____

C. Do you find the defendant DaimlerChrysler Corporation to be at fault on Plaintiffs' claim for failure to warn at the time of sale?

Yes X No _____

D. Do you find the defendant DaimlerChrysler Corporation to be at fault on Plaintiffs' claim for post-sale failure to warn?

Yes X No _____

2. Do you find the defendant Louis A. Stockell, Jr., to be at fault?

Yes X No _____

3. Considering all of the fault at 100%, what percentage of the total fault is chargeable to each of the following parties?

DaimlerChrysler Corporation 50 % (0-100%)

Louis A. Stockell, Jr. 50 % (0-100%)

Total <0% or 100%>

4. Without considering the percentage of fault found in Question 3, what total amount of damages, if any, do you find were sustained by the following parties:

Jeremy Flax and Rachel Sparkman as the Natural Parents of Joshua Flax, deceased, for the wrongful death of Joshua Flax:

\$5,000 000.00 (five million dollars)

Rachel Sparkman, individually, for negligent infliction of emotional distress:

\$2,500,000.00

5. Do you find, by clear and convincing evidence, that DaimlerChrysler Corporation acted recklessly with regard to the conduct on which you base your finding of liability such that punitive damages shall be awarded against DaimlerChrysler Corporation?

Yes X No _____

11/22/04

DATE

/s/
PRESIDING JUROR

EXHIBIT 2
IN THE CIRCUIT
COURT FOR DAVIDSON COUNTY
TENNESSEE

CIVIL ACTION NO. 02C-1288

JEREMY FLAX and RACHEL SPARKMAN, as
the Natural Parents of Joshua Flax, deceased; and
RACHEL SPARKMAN, individually;

Plaintiffs,

vs.

DAIMLERCHRYSLER CORPORATION and
LOUIS A. STOCKELL, JR.,

Defendants.

VERDICT FORM-PHASE II

We, the jury, unanimously answer the questions
submitted by the Court as follows:

What amount of punitive damages do you find
should be awarded against defendant
DaimlerChrysler Corporation on the following
claims?

Jeremy Flax and Rachel Sparkman as
the Natural Parents of Joshua Flax,
deceased, on the wrongful death claim
of Joshua Flax:

\$65,500,000.00 (65.5 million)

164a

Rachel Sparkman, individually, on the
claim for negligent infliction of
emotional distress:

\$32,500,000 (32.5 million)

11/23/04

DATE

/s/

PRESIDING JUROR

IN THE FIRST CIRCUIT
COURT FOR DAVIDSON COUNTY
TENNESSEE

CIVIL ACTION NO. 02C-1288

JEREMY FLAX and RACHEL SPARKMAN, as
the Natural Parents of Joshua Flax, deceased; and
RACHEL SPARKMAN, individually;

Plaintiffs,

vs.

DAIMLERCHRYSLER CORPORATION and
LOUIS A. STOCKELL, JR.,

Defendants.

REVISED PUNITIVE DAMAGES: FINDINGS OF
FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT:

Joshua Flax was fatally injured on June 30, 2001 when the 1998 Dodge Caravan ("minivan") in which he was riding was hit from behind by a Ford pick-up truck. Jim and Sandra Sparkman, grandparents of Joshua Flax, owned the minivan. Louis Stockell owned the Ford pick-up truck that struck the Sparkman's vehicle.

The impact occurred as the minivan was exiting a residential driveway onto Old Charlotte Pike in Davidson County, Tennessee. Louis Stockell was driving at an excessive speed and was unable to avoid hitting the minivan from behind. During the collision, the minivan seats yielded rearward in a

reclining position. As the seat yielded backwards, contact was made between the front passenger's head and Joshua Flax's head. Joshua's car seat was placed directly behind the front passenger seat and Joshua was forward facing at the time of the accident. The impact caused an indentation in Joshua's forehead. The blunt force to Joshua's head caused him to have severe brain damage that led to his death on July 1, 2001. None of the other occupants in the vehicle had severe injuries from this accident.

The parents of Joshua Flax, Rachel Sparkman and Jeremy Flax, brought a products liability action against DaimlerChrysler Corporation ("DaimlerChrysler") for defective seat design and for the wrongful death of Joshua Flax. Louis Stockell was also named as a defendant for the wrongful death of Joshua Flax.

The jury found that both Louis Stockell and DaimlerChrysler were the legal cause of Joshua's injuries. The jury allocated 50% fault to Mr. Stockell and 50% fault to DaimlerChrysler for the wrongful death of Joshua Flax. The jury awarded a total of \$7.5 million in compensatory damages for the wrongful death of Jeremy Flax and for Rachel Sparkman's claim for negligent infliction of emotional distress. In a separate hearing, the jury found by clear and convincing evidence that punitive damages were appropriate against DaimlerChrysler for its reckless conduct. In Phase II of the trial, the jury found that punitive damages should be awarded to the plaintiff in the amount of 98 million dollars against DaimlerChrysler.

CONCLUSIONS OF LAW:

In accordance with Hodges v. Toof, 833 S.W.2d 896, 901 (Tenn. 1992), punitive damages can only be awarded when a defendant acts 1) intentionally, 2) fraudulently, 3) maliciously, or 4) recklessly. In this case, the jury found by clear and convincing evidence that DaimlerChrysler acted recklessly. A person or entity is reckless when "the person is aware of, but consciously disregards, a substantial and unjustifiable risk of such a nature that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all circumstances." Id. at 901. (citing T.C.A. § 39-11-302(c)(1991)).

The jury found that the yielding minivan seats were unreasonably dangerous to front occupants in the vehicle, and young children placed behind these seats. Plaintiff's expert, Dr. Ken Saczalski, found that the minivan seat was "defective and deficient in that it allowed penetration into the rear occupant area where it allowed the child to be severely injured in what [would be considered] a moderate kind of impact." (11/8/04 T. 92/8-19) (PX 446). DaimlerChrysler's own documents and testimony by designer Neville D'Souza demonstrated that DaimlerChrysler had the weakest seat design strength requirement of all the other manufacturers of which it compared itself to. (11/3/04 T. 111/21-113/7) (PX 31).

Evidence and testimony at trial revealed that DaimlerChrysler had knowledge that these seats were unreasonably dangerous. In all of the DaimlerChrysler FMVSS 301 rear impact crash tests, the front seat collapsed backward into the back area where a child would be sitting. (11/8/04 T. 171/19- 174/20). During these tests,

DaimlerChrysler's engineers would actually brace the front seats to prevent the front seats and the dummies from yielding backwards and injuring the testing instruments located behind the front seats. (PX 17) (11/3/04 T. 226/7-228 8).

In addition, DaimlerChrysler had been receiving complaints about seat backs as far back as the mid-1980's. (11/4/04 T 55/3-8, 16-20; 67/3-6) (Roy Porterfield). DaimlerChrysler discovered from these complaints that children were being injured as a result of the yielding seat backs. (Id. at 72/21-73/7). From these calls, DaimlerChrysler was able to ascertain that if a front seat collapses and there is a small child in the back seat then the "child could be impacted by that seat." (Id. at 76/5-11).

As well as the crash tests and customer complaints, the Minivan Safety Leadership Team at DaimlerChrysler had discussed at their meetings issues regarding seat back strength. (11/10/04 T. 44/11-17). At the meeting on March 16, 1993, the attendees agreed, "the proper way to protect customers is to design seats for the real world." (Id. at 49/17-21). The team did not believe that it was sufficient to design seats merely to meet minimum federal seat back strength standard, FMVSS 207. (Id. at 49/22-50/3). The Minivan Safety Leadership Team knew that the "collapsing minivan seat was a significant injury producing problem" and was "aware of the fact that people were being injured or killed in Chrysler vehicles, minivans in particular, where the front seat backs were collapsing as a result of a rear end collision." (Id. at 67/6-9). The leadership team concluded that the minivan seats "were not adequate" to "protect customers." (Id. at 128/10-16). From this evidence it is clear that the

Minivan Safety Leadership Team and DaimlerChrysler had a high degree of notice, knowledge, and concern about the dangers of the seat backs in the minivans.

From the evidence presented at trial, the Court is of the opinion that the jury properly found that DaimlerChrysler acted recklessly and that punitive damages were warranted in Phase I of this case.

During Phase II of the trial, the jury considered the following factors to determine the amount of punitive damages to award:

- 1) The defendant's financial affairs, financial condition, and net worth;
- 2) The nature and reprehensibility of defendant's wrongdoing;
- 3) The defendant's awareness of the amount of harm being caused and defendant's motivation in causing the harm ;
- 4) The duration of defendant's misconduct and whether defendant attempted to conceal the conduct;
- 5) The expense plaintiff has borne in the attempt to recover the losses;
- 6) Whether defendant profited from the activity, and if defendant did profit, whether the punitive award should be in excess of the profit in order to deter similar future behavior;
- 7) Whether, and the extent to which defendant has been subjected to previous punitive damage awards based upon the same wrongful act; (OMITTED)

- 8) Whether, once the misconduct became known to defendant, defendant took remedial action or attempted to make amends by offering a prompt and fair settlement for actual harm caused; and
- 9) Any other circumstances shown by the evidence that bear on determining the proper amount of the punitive award.

Hodges v. Toof, 833 S.W.2d 396 901 (1992).

The Court will address each of the following factors listed above in order to evaluate the appropriateness of the size of punitive damages to award.

1. Defendant's Financial Affairs, Financial Condition, and Net Worth:

The evidence at trial established that DaimlerChrysler's financial condition for the third quarter 2004 was \$42.8 billion dollars. (PX 115). This evidence demonstrates that DaimlerChrysler is a company of substantial assets and income. The Court is of the opinion that DaimlerChrysler has resources to pay a substantial punitive damage award to deter future misconduct and wrongdoing.

2. The Nature and Reprehensibility of the Defendant's Wrongdoing:

The court finds that DaimlerChrysler's conduct was indeed reprehensible. DaimlerChrysler was selling and marketing its minivans to families. DaimlerChrysler advertised that, "the minivan was built for children and that Chrysler surrounds the children with safety." (11/30/04 T. 134/2-18) (PX 61). Jim Sparkman testified that this is the very reason that he bought the minivan. He stated that he and

his wife "wanted a vehicle that would be a family vehicle, basically that we could use with our children, our grandchildren...to travel with them." (11/4/04 T. 92/3-9) (Jim Sparkman). Even though DaimlerChrysler was aware that its yielding minivan seats were causing injury and death to children, it still encouraged parents to put children behind these seats. DaimlerChrysler even designed an integrated child seat located directly behind the yielding front seat in some of the late minivan models.

Impact of defendant's conduct on the plaintiff

The impact that defendant's' conduct has had on the plaintiff is horrific. DaimlerChrysler's reckless conduct, concealment of its knowledge, and failure to warn resulted in the injury and death of plaintiffs' only child, Jeremy Flax.

The relationship of defendant to plaintiff

The relationship that the defendant had with the plaintiff was one of manufacturer to consumer. Plaintiffs were consumers who put their faith and trust in DaimlerChrysler to manufacture and sell a safe family vehicle. The plaintiffs were not privy to crash tests and reports that were prepared by DaimlerChrysler highlighting the problem with yielding seats in its minivans. On the contrary, plaintiffs relied solely on information that DaimlerChrysler gave them, and were dependent on DaimlerChrysler to design a safe vehicle and to warn of any problems of which it knew about.

The Court is of the opinion that DaimlerChrysler's reprehensible conduct of concealing and not warning customer of the known

dangers of putting children behind yielding seats supports a substantial jury award.

3. The Defendant's Awareness of the Amount of Harm Being Caused and the Defendant's Motivation Causing the Harm:

The Court finds that DaimlerChrysler was aware of the injuries and deaths caused by the yielding seat backs. DaimlerChrysler had numerous complaints that put them on notice that people were being injured by these seats. DaimlerChrysler's own experts even admitted that in rear impact collisions, the seat backs would go backwards and children would be injured or killed.

The motivation for DaimlerChrysler's conduct was to avoid spending the extra money to fix the problem of a weak seat back design. DaimlerChrysler's documents reflect that installing a dual recliner, which would double the seat strength, would have added seven dollars to the cost of each of the front seats. The Court finds that this factor supports a high punitive damages award.

4. The Duration of the Defendant's Misconduct and Whether Defendant Attempted to Conceal the Conduct:

DaimlerChrysler has had the same type of yielding seat in its minivan for over 20 years. Since the 1980's, DaimlerChrysler has been bracing its seats to avoid injuring instruments and equipment in the back seat. In addition, there have been complaints and claims filed with DaimlerChrysler's call center dating back from the 1980's reporting incidents of seat back failure in its minivans. This evidence shows that for many years now

DaimlerChrysler has had knowledge of the yielding seat backs, and the injuries caused to adults and young children due to the seat back design.

Testimony at trial also revealed that DaimlerChrysler attempted to conceal the information about its seat backs from the public. After the Minivan Safety Leadership Team identified its concern with the yielding seat backs, DaimlerChrysler's response was to retrieve and destroy all the team's minutes that pertained to seat back design. Further, Eric Clark, a DaimlerChrysler executive, testified at trial in Phase II that the public "does not have a right to know everything" that DaimlerChrysler knew. (11/23/04 T. 97/2-11),

He also stated that consumers did not have a right to know "what DaimlerChrysler knew about the dangers and risks." (Id. at 98/10-18).

The court is of the opinion that the duration of the misconduct and the fact that DaimlerChrysler attempted to conceal the misconduct warrants punitive damages in this case.

5. The Expense Plaintiff Has Borne in the Attempt to Recover Its Losses:

The Court is of the opinion that this case has been very expensive to try. Plaintiff's expert testified at trial that he was being paid approximately \$200,000 by plaintiff's counsel in connection with his work on this case. In addition, the bulk of plaintiff's trial team was from out of town and they have borne significant travel expenses from the month long trial. The Court finds that the plaintiff's expenses are in the hundreds of thousands of dollars and should be taken into consideration when computing the punitive damage award.

6. Whether Defendant Profited From the Activity, and If Defendant Did Profit, Whether the Punitive Damages Award Should Be in Excess of the Profit in Order Deter Similar Future Behavior:

DaimlerChrysler profited by not making both of its front seats dual recliners. In the 1980's, DaimlerChrysler noted that to redesign the seat backs to prevent them from collapsing would result in a "piece penalty", which would be an increase in cost to change the design. Therefore, the Court finds that DaimlerChrysler did profit from choosing not to change the seat back design. This factor weighs in favor of a considerable punitive damages award.

7. Previous Punitive Damages Awards Based Upon The Same Wrongful Act:

Daimler Chrysler and the plaintiffs jointly consented not to charge the jury on this factor. DaimlerChrysler filed previous punitive damage awards under court ordered seal. The Court retains the sealed document to be opened at a later date once the litigation ends.

8. Whether, Once the Misconduct Became Known to the Defendant, Defendant Took Remedial Action Or Attempted to Make Amends By Offering a Prompt and Fair Settlement for Actual Harm Caused:

There is no evidence that DaimlerChrysler offered a prompt and fair settlement for the actual harm caused. Since the Court knows of no evidence of offers to settle, this factor weighs in favor of the plaintiff for an award of punitive damages.

9. Any Other Circumstances Shown By the Evidence That Bear On Determining the Proper Amount of the Punitive Award:

The Court is of the opinion that the punitive damages award should be reduced to 20 million dollars, a remittitur of 78 million dollars. It has been suggested by the United States Supreme Court that the ratio of punitive damages to compensatory damages should not be greater than 10 to 1. BMW of North America v. Gore, 517 U.S. 559, 581 (1996)(quoting Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991)). The Supreme Court stated, “[s]ingle-digit multipliers are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution....” State Farm v. Campbell, 538 U.S. 403, 425 (2003). Although the United States Supreme Court decided that it would be unable to draw a mathematical bright line rule between the constitutionally acceptable and constitutionally unacceptable, the “general concer[n] of reasonableness...properly enter[s] into the constitutional calculus.” TXO Production Corp. v. Alliance Resources Corp., et al., 509 U.S. 443, 481 (1993)(quoting Haslip, 499 U.S., at 18)).

The difference between the punitive damages and compensatory damages in this case is 26 to 1. The wide gap between the two ratios is enough to make the Court raise a suspicious judicial eyebrow to the fact that the punitive damages awarded in this case do not comport with due process and are not within a constitutionally acceptable range.

The Court also notes that a lower ratio is appropriate when compensatory damages are substantial. In State Farm, the Supreme Court found that a punitive damages award of 145 million

was not appropriate when the plaintiff received a substantial compensatory damages award. State Farm, 538 U.S. at 429. The Supreme Court stated, “[w]hen compensatory damages are substantial, then a lesser ratio...can reach the outermost limit of the due process guarantee.” Id. at 425. In this case, the compensatory damage award was substantial and therefore, a remittitur to the punitive damage award is appropriate.

For these reasons, the Court finds that punitive damages are warranted and supported by the evidence in this case. However, the Court suggests a remittitur in the amount of 78 million dollars. The amount of punitive damages suggested by the Court assessed to DaimlerChrysler is 20 million dollars.

The plaintiffs are directed to draw the final order based on these findings of fact and conclusions of law.

ENTERED this 23 day of June, 2005.

/s/
JUDGE HAMILTON GAYDEN

IN THE FIRST CIRCUIT
COURT FOR DAVIDSON COUNTY
TENNESSEE

CIVIL ACTION NO. 02C-1288

JEREMY FLAX and RACHEL SPARKMAN, as
the Natural Parents of Joshua Flax, deceased; and
RACHEL SPARKMAN, individually;

Plaintiffs,

vs.

DAIMLERCHRYSLER CORPORATION and
LOUIS A. STOCKELL, JR.,

Defendants.

MEMORANDUM DECISION:

MOTION FOR JNOV OR, IN THE ALTERNATIVE,
FOR NEW TRIAL:

The Court overrules the motion for a Judgment
Notwithstanding the Verdict ("JNOV") and overrules
the motion for a new trial.

The Court suggests a remittitur to the ninety-
eight million dollar punitive damages award
assessed by the jury against the Defendant Daimler
Chrysler Corporation. The Court suggests the
amount of punitive damages should be twenty
million dollars.

The Court will address some of the pivotal issues
raised in the motion for a JNOV and new trial. The
Court will also review the second phase, the punitive
damage portion, of the trial as required by Hodges v.

Toof, 833 S.W.2d 896 (Tenn. 1992) in a separate memorandum.

I. NEGLIGENCE INFILCTION OF EMOTIONAL DISTRESS ("NIED")

A. VERDICT FORM

The Court finds that the jury verdict form was properly submitted to the jury on the issue of whether or not damages should be awarded to the plaintiff for negligent infliction of emotional distress ("NIED"). Daimler Chrysler Corporation ("DaimlerChrysler") argues that the Court must vacate the compensatory and punitive damage award for NIED. DaimlerChrysler's threshold argument is that although the jury form had a blank for the jury to assess damages to the defendants for NIED, there was not a question on the jury form that asked whether or not DaimlerChrysler, was at fault for NIED. The jury form only asked whether DaimlerChrysler was liable on other grounds including: 1) defective produce; 2) unreasonably dangerous product; 3) failure to warn at the time of sale; and 4) post-sale failure to warn. There was no "at fault" question as to whether DaimlerChrysler was liable for Rachel Sparkman's NIED claim.

DaimlerChrysler contends that it would violate due process to impose damages based on conduct to which it has never been found liable.

DaimlerChrysler submits that it was not required to object to the verdict form or ensure that the "at fault" question was included on the form. In DaimlerChrysler's view, NIED should not have been submitted to the jury anyways and they contend that this Court did not properly submit this issue to the jury.

DaimlerChrysler cites to several cases from other jurisdictions to support its position that the NIED claim was improperly submitted to the jury. In Kinnel v. Mid-Atlantic Mausoleums, Inc., 850 F.2d 958 (3d Cir. 1988), the United States Court of Appeals found that the verdict against the president of a building company could not be sustained since interrogatories to the jury did not purport to assess the president's individual liability. Id. Defendant Mid-Atlantic was in the business of building mausoleums. Id. at 960. Defendant Kennan was the president of Mid-Atlantic. Id. Plaintiff sought damages against defendants for breach of contract and fraudulent misrepresentation. Id. at 959. The jury, in response to written interrogatories, found Defendant Mid-Atlantic liable. Id. There were no questions on the interrogatories submitted to the jury regarding Kennan's individual liability nor did any instructions given to the jury mention liability at against Defendant Kennan. Id. at 959. Although the jury only found Mid-Atlantic liable, the district court entered judgment against both Mid-Atlantic and Kennan. Id. The Court of Appeals found that there was sufficient evidence to support the jury's verdict against Mid-Atlantic but that it was error for the district court to enter judgment against Kennan. Id. at 960.

In Loya v. Wyoming, 99 P.3d 972 (Wyo, 2004), the Wyoming Supreme Court found that the defendant could not be held individually liable for breach of contract when claims were not made against him on the special verdict form. The Court stated, "the special verdict form was not constructed so as to require the jury to address all the claims asserted in the complaint." Id. at 976. The Court went on to state, "the parties are held accountable

for creating and acquiescing to an inartfully drafted jury verdict form." Id. at 979.

In addition, DaimlerChrysler cited to Oliveira v. Ilion Taxi Aero LTDA, 830 So.2d 241 (Fla. Dist. Ct. App. 2002), in which the Florida District Court of Appeals found that an award of punitive damages on a fraud claim was error since the jury did not find liability as to that claim. Id. The District Court also found that the defendants did not waive their objection even though they did not object before the jury was charged. Id.

The Court is of the opinion that the cases cited in DaimlerChrysler's brief are not on point to the situation in this case. In Kinnel, one of the defendants was left off the verdict sheet. Kinnel, 850 F.2d at 959. In this case, there is no question that the jury was aware that DaimlerChrysler was one of the defendants and was listed on the verdict form. In Loya, the jury did not make any findings as to the liability of the defendant on the breach of contract claim because the jury form was not constructed in a way to address all the claims asserted in the complaint. Id. at 976. Here, the underlying liability claim was the same for wrongful death and NIED and the jury specifically awarded NIED damages to Rachel Sparkman on the verdict form. Lastly, in Oliveira, the defendant was not assessed any liability in the underlying case but still the jury came back and awarded punitive damages against the defendant. This is completely different than the present case since the jury did find DaimlerChrysler to be liable. In addition, defense counsel for DaimlerChrysler should have brought to the trial court's attention any objections that they had to the verdict form regarding Rachel Sparkman's NIED

claim. If there was any error, although the Court does not find any reversible error in the verdict form, it was defense counsel's burden to bring any inconsistencies in the verdict form to the Court's attention or else the objection is waived. Keith v. Murfreesboro Livestock Mkt., 780 S.W.2d 751, 759 (Tenn. Ct. Apr. 1989).

B. EVIDENCE SUFFICIENT TO SUPPORT NIED CLAIM

It is the opinion of the Court that Rachel Sparkman's claim for NIED was properly before the jury, and that there was sufficient evidence to support her claim for NIED. Furthermore, the Court finds that expert proof was not necessary in this case since Rachel Sparkman's claim was not stand-alone.

DaimlerChrysler argues that the NIED claim was not supported with expert proof and it was therefore error to submit this claim to the jury. DaimlerChrysler relies on Camper v. Minor, 915 S.W.2d 437, 446 (Tenn. 1996), for the proposition that when a plaintiff seeks to recover damages for NIED, there needs to be some type of expert or medical proof. Id. at 446. The reason for adding this additional element of proof was to combat any fraudulent or frivolous claims that might be brought. Id. Following Camper, the Tennessee Supreme Court concluded that not all NIED claims needed this heightened requirement of expert proof. Estate of Amos v. Vanderbilt University, 62 S.W.3d 133 (Tenn. 2001). The Court stated, [t]he special proof requirements in Camper are a unique safeguard to ensure the reliability of "stand-alone" negligent infliction of emotional distress claims.... When emotional damages are a 'parasitic' consequence of negligent conduct that results in multiple types of

damages, there is no need to impose special pleading or proof requirements that apply to 'stand-alone' emotional distress claims." Id. at 136.

In this case, the Court finds that expert proof was not necessary since Rachel Sparkman's NIED claim was not a stand-alone claim. Ms. Sparkman's NIED was derivative of her claim as a co-plaintiff for the wrongful death of Jeremy Flax. In addition to Ms. Sparkman's NIED claim, she also brought a claim for damages resulting from the loss of filial consortium resulting from Joshua's death. Since Ms. Sparkman brought multiple claims for damages, her NIED claim is not considered by the Court to be stand-alone. The Court also finds that there is sufficient evidence to support Ms. Sparkman's NIED claim. The emotional distress of seeing her young child fatally injured in a car accident would clearly meet the requirements of the tort and would be seen as a severe injury. Therefore, the Court is of the opinion that Rachel Sparkman's claim for NIED was properly before the Court and her claim did not require any additional expert proof.

II. PUNITIVE DAMAGES

The Court finds that it was appropriate to award punitive damages in this case. Under Tennessee law, the Court can only award punitive damages when the defendant has acted either (1) intentionally, (2) fraudulently, (3) maliciously, or (4) recklessly. Hodges v. S.C. Toof, 833 S.W.2d 896, 901 (Tenn. 1992). According to the Tennessee Supreme Court, "[a] person acts recklessly when the person is aware of, but consciously disregards, a substantial and unjustifiable risk of such a nature that its disregard constitutes a gross deviation from the standard of care that an ordinary person would

exercise under all circumstances." Id. (citing TENN. CODE ANN. § 39-11-302(c)(criminal definition of recklessness)).

After hearing all the evidence, the jury found that DaimlerChrysler acted recklessly. Evidence at trial demonstrated that DaimlerChrysler was aware that young children were being injured in similar accidents due to seat backs collapsing backwards. DaimlerChrysler did nothing to warn customers of this known danger but instead encouraged parents to put their children in the rear seats directly behind the collapsing seats. In addition, in some of the minivan models, DaimlerChrysler designed an integrated child seat that was located directly behind the front passenger seat. The Court is of the opinion that DaimlerChrysler acted recklessly and punitive damages were warranted in this case.

III. POST-SALE DUTY TO WARN

The Court finds that it was proper to admit evidence related to post-sale failure to warn on the issue of feasibility. Mercedes-Benz had knowledge in their possession that showed the benefits of strong seat backs. When Mercedes-Benz and Chrysler merged in 1998, DaimlerChrysler at that time was able to share and collect information with Mercedes-Benz on seat design and how strong the seatbacks in vehicles should be. Although DaimlerChrysler was privy to this information, they decided not to make their seatbacks as strong as Mercedes-Benz. The fact that Mercedes-Benz was making a stronger seat shows that it was feasible for DaimlerChrysler to put stronger seats in its minivans as well. Along with the information DaimlerChrysler received from Mercedes-Benz, DaimlerChrysler already had a stronger seatback in place in the Chrysler Sebring

vehicle, at the same time that the to NS dual recliner seat was on the market.

In addition, the Court finds that it was appropriate to enter into evidence other similar incidents ("OSI") that occurred after the sale of the Flax minivan. There are other reasons besides a post sale duty to warn to allow subsequent OSIs into the record. Tennessee law allows other similar incidents to be introduced into evidence that occurred both before and after the incident took place. In Winfrey v. Coca-Cola Bottling Works, 83 S.W.2d 903 (Tenn. Ct. App. 1935) the court found that it was admissible to have witnesses testify as to what the defendant knew "prior to, about the time, and subsequent to this accident" about exploding Coca-Cola bottles. Id. at 905. Likewise, it was appropriate for the Court in this case to consider prior and subsequent claims of seatback failure that were similar to their injuries in Flax.

SUPPLEMENTAL MOTION FOR JNOV OR NEW TRIAL AND MOTION FOR DISCRETIONARY COSTS:

DaimlerChrysler has filed a motion for a new trial based on newly discovered evidence. In a deposition, in another DaimlerChrysler lawsuit (the Neal case), plaintiff's expert, Dr. Kenneth Saczalski, disclosed that he had conducted a series of sled tests on the dual recliner RS minivan seats in 2002. (The RS minivan seat replaced the NS minivan seat in 2001. The NS model, which is the subject of this lawsuit, was utilized from 1996-2000). Dr. Saczalski admitted in the Neal deposition that these tests were conducted under similar conditions as the accident in this case with around a 20 delta-V force. Furthermore, Dr. Saczalski admitted that the

dummy in the RS dual recliner seat made contact with the 3-year old surrogate dummy.

In this case, DaimlerChrysler made a timely discovery request of the plaintiff for "any videos, photos, or tests created or obtained by Plaintiff's experts." See DaimlerChrysler's Second Set of Requests for Production of Documents, at 8. Plaintiffs did not disclose a series of RS sled tests conducted by Dr. Saczalski to Defendant DaimlerChrysler.

DaimlerChrysler has asked the Court to grant a new trial based on plaintiffs abuse of the discovery process. Defendant DaimlerChrysler has argued that disclosure of the sled tests would, or could have resulted in a different outcome at trial. In order for a party to obtain a new trial based on newly discovered evidence, the party must show that the evidence was discovered after the trial was concluded, that the party could not have discovered the evidence on its own with due diligence, that it is material and not merely cumulative or impeaching, and that *the evidence will probably change the result if a new trial is granted.* Crain v. Brown, 823 S.W.2d 187, 192 (Tenn. Ct. App. May 1, 1991)(citing 20 Tennessee Jurisprudence, New Trials §§ 6, 7, 8, 9, and 10) (emphasis added)). The Court is of the opinion that discovery of the RS sled tests would not have affected the outcome of the trial.

The Court finds that the focal point for the discovery abuse was whether or not there was a reasonable alternative to the NS minivan seat. The fact is that DaimlerChrysler manufactured a safer alternative to the NS seat in the Chrysler Sebring vehicle. Further, DaimlerChrysler had access to Mercedes Benz's technology that utilized stronger and safer seat backs in its vehicles.

Nevertheless, the Court sanctions the plaintiffs under Rule 37 of the Tennessee Rules of Civil Procedure for abusing the discovery process. See TENN. R. CIV. P. 37.04(3) (authorizing sanctions for a party who "fails . . . to serve a written response to a request for inspection submitted under Rule 34"). Therefore, the Court denies any and all discretionary costs for failing to discover the RS sled tests conducted by DT. Saczalski in the Neal case.

In addition to the discovery dispute, the Court has also considered DaimlerChrysler's supplemental response seeking a new trial based on the ad damnum clause. DaimlerChrysler alleges that plaintiffs' failure to state a specific amount in their complaint entitles defendant to a new trial. DaimlerChrysler argues that since a specific amount was not alleged in the complaint, the judgment rendered in this case is invalid. The Court disagrees. The Court finds that the plaintiffs did state that they were seeking damages in a specific amount to be "determined by the enlightened conscience of the jury to be sufficient to punish DC and deter it from similar future conduct." See Plaintiffs' Complaint at ¶¶ 51-53, 55. The cases that DaimlerChrysler relies on in its brief state the rule that when a plaintiff requests a sum specific in the complaint, the plaintiff can then not recover a judgment in excess of that specific sum. There are no cases on point in Tennessee that state that when damages are requested, but there is not a specific sum stated, the judgment is void. Therefore, the Court does not find merit in this claim and denies the motion for new trial.

For the foregoing reasons, DaimlerChrysler's motion for JNOV or, in the alternative, for new trial

is denied. The supplemental motions filed by DaimlerChrysler are also denied.

ENTERED this 20th day of June, 2005,

/s/
JUDGE HAMILTON GAYDEN

IN THE FIRST CIRCUIT
COURT FOR DAVIDSON COUNTY
TENNESSEE

CIVIL ACTION NO. 02C-1288

JEREMY FLAX and RACHEL SPARKMAN, as
the Natural Parents of Joshua Flax, deceased; and
RACHEL SPARKMAN, individually;

Plaintiffs,

vs.

DAIMLERCHRYSLER CORPORATION and
LOUIS A. STOCKELL, JR.,

Defendants.

PUNITIVE DAMAGES: FINDINGS OF FACT AND
CONCLUSIONS OF LAW

FINDINGS OF FACT:

Joshua Flax was fatally injured on June 30, 2001 when the 1998 Dodge Caravan ("minivan") in which he was riding was hit from behind by a Ford pick-up truck. Jim and Sandra Sparkman, grandparents of Joshua Flax, owned the minivan. Louis Stockell owned the Ford pick-up truck that struck the Sparkman's vehicle.

The impact occurred as the minivan was exiting a residential driveway onto Old Charlotte Pike in Davidson County, Tennessee. Louis Stockell was driving at an excessive speed and was unable to avoid hitting the minivan from behind. During the collision, the minivan seats yielded rearward in a

reclining position. As the seat yielded backwards, contact was made between the front passenger's head and Joshua Flax's head. Joshua's car seat was placed directly behind the front passenger seat and Joshua was forward facing at the time of the accident. The impact caused an indentation in Joshua's forehead. The blunt force to Joshua's head caused him to have severe brain damage that led to his death on July 1, 2001. None of the other occupants in the vehicle had severe injuries from this accident.

The parents of Joshua Flax, Rachel Sparkman and Jeremy Flax, brought a products liability action against DaimlerChrysler Corporation ("DaimlerChrysler") for defective seat design and for the wrongful death of Joshua Flax. Louis Stockell was also named as a defendant for the wrongful death of Joshua Flax.

The jury found that both Louis Stockell and DaimlerChrysler were the legal cause of Joshua's injuries. The jury allocated 50% fault to Mr. Stockell and 50% fault to DaimlerChrysler for the wrongful death of Joshua Flax. The jury awarded a total of \$7.5 million in compensatory damages, for the wrongful death of Jeremy Flax and for Rachel Sparkman's claim for negligent infliction of emotional distress. In a separate hearing, the jury found by clear and convincing evidence that punitive damages were appropriate against DaimlerChrysler for its reckless conduct. In Phase II of the trial, the jury found that punitive damages should be awarded to the plaintiff in the amount of 98 million dollars against DaimlerChrysler.

CONCLUSIONS OF LAW:

In accordance with Hodges v. Toof, 833 S.W.2d 896, 901 (Tenn. 1992), punitive damages can only be awarded when a defendant acts 1) intentionally, 2) fraudulently, 3) maliciously, or 4) recklessly. In this case, the jury found by clear and convincing evidence that DaimlerChrysler acted recklessly. A person or entity is reckless when "the person is aware of, but consciously disregards, a substantial and unjustifiable risk of such a nature that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all circumstances." Id. at 901. (citing T.C.A. § 39-11-302(c)(1991)).

The jury found that the yielding minivan seats were unreasonably dangerous to front occupants in the vehicle, and young children placed behind these seats. Plaintiff's expert, Dr. Ken Saczalski, found that the minivan seat was "defective and deficient in that it allowed penetration into the rear occupant area where it allowed the child to be severely injured in what [would be considered] a moderate kind of impact." (11/8/04 T. 92/8-19) (PX 446). DaimlerChrysler's own documents and testimony by designer Neville D'Souza demonstrated that DaimlerChrysler had the weakest seat design strength requirement of all the other manufacturers of which it compared itself to. (11/3/04 T. 111/21-113/7) (PX 31).

Evidence and testimony at trial revealed that DaimlerChrysler had knowledge that these seats were unreasonably dangerous. In all of the DaimlerChrysler FMVSS 301 rear impact crash tests, the front seat collapsed backward into the back area where a child would be sitting. (11/8/04 T. 171/19- 74/20). During these tests,

DaimlerChrysler's engineers would actually brace the front seats to prevent the front seats and the dummies from yielding backwards and injuring the testing instruments located behind the front seats. (PX 17) (11/3/04 T. 226/7 228/1).

In addition, DaimlerChrysler had been receiving complaints about seat backs as far back as the mid-1980's. (11/4/04 T 55/3-8, 16-20; 67/3-5) (Roy Porterfield). DaimlerChrysler discovered from these complaints that children were being injured as a result of the yielding seat backs. (Id. at 72/21-73/7). From these calls, DaimlerChrysler was able to ascertain that if a front seat collapses and there is a small child in the back seat then the "child could be impacted by that seat." (Id. at 76/5-11).

As well as the crash tests at 1 customer complaints, the Minivan Safety Leadership Team at DaimlerChrysler had discussed at their meetings issues regarding seat back strength. (11/10/04 T. 44 11-17). At the meeting on March 16, 2003, the attendees agreed, "the proper way to protect customers is to design seats for the real world." (Id. at 49/17-21). The team did not believe that it was sufficient to design seats merely to meet minimum federal seat back strength standard, FMVSS 207. (Id. at 49/22-50/3). The Minivan Safety Leadership Team knew that the "collapsing minivan seat was a significant injury producing problem" and was "aware of the fact that people were being injured or killed in Chrysler vehicles, minivans in particular, where the front seat backs were collapsing as a result of a rear end collision." (Id. at 67/6-9). The leadership team concluded that the minivan seats "were not adequate" to "protect customers." (Id. at 128/10-16). From this evidence it is clear that the

Minivan Safety Leadership Team and Daimler-Chrysler had a high degree of notice, knowledge, and concern about the dangers of the seat backs in the minivans.

From the evidence presented a trial, the Court is of the opinion that the jury properly found that Daimler Chrysler acted recklessly and that punitive damages were warranted in Phase I of this case.

During Phase II of the trial, the jury considered the following factors to determine the amount of punitive damages to award:

- 1) The defendant's financial affairs, financial condition, and net worth;
- 2) The nature and reprehensibility of defendant's wrongdoing;
- 3) The defendant's awareness of the amount of harm being caused and defendant's motivation in causing the harm;
- 4) The duration of defendant's misconduct and whether defendant attempted to conceal the conduct;
- 5) The expense plaintiff has borne in the attempt to recover the losses;
- 6) Whether defendant profited from the activity, and if defendant did profit, whether the punitive award should be in excess of the profit in order to deter similar future behavior;
- 7) Whether, and the extent to which, defendant has been subjected to previous punitive damage awards based upon the same wrongful act; (OMITTED)
- 8) Whether, once the misconduct became known to defendant, defendant took remedial action or

attempted to make amends by offering a prompt and fair settlement for actual harm caused; and

9) Any other circumstances shown by the evidence that bear on determining the proper amount of the punitive award.

Hodges v. Toof, 833 S.W.2d 996, 901 (1992).

The Court will address each of the following factors listed above in order to evaluate the appropriateness of the size of punitive damages to award.

1. Defendant's Financial Affairs, Financial Condition, and Net Worth:

The evidence at trial established that DaimlerChrysler's financial condition for the third quarter 2004 was \$42.8 billion dollars. (PX J 15). This evidence demonstrates that DaimlerChrysler is a company of substantial assets and income. The Court is of the opinion that DaimlerChrysler has the resources to pay a substantial punitive damage award to deter future misconduct and wrongdoing.

2. The Nature and Reprehensibility of the Defendant's Wrongdoing:

The court finds that DaimlerChrysler's conduct was indeed reprehensible. DaimlerChrysler was selling and marketing its minivans to families. DaimlerChrysler advertised that, "the minivan was built for children and that Chrysler surrounds the children with safety." (11/30/04 T. 11: 4/2-18) (PX 61). Jim Sparkman testified that this is the very reason that he bought the minivan. He stated that he and his wife "wanted a vehicle that would be a family vehicle, basically that we could use with our children, our grandchildren...to travel with them"

(1114/04 T. 92/3-9) (Jim Sparkman). Even though DaimlerChrysler was aware that its yielding minivan seats were causing injury and death to children, it still encouraged parents to put children behind these seats.

DaimlerChrysler even designed an integrated child seat located directly behind the yielding front seat in some of the later minivan models.

Impact of defendant's conduct on the plaintiff

The impact that defendant's conduct has had on the plaintiff is horrific. DaimlerChrysler's reckless conduct, concealment of its knowledge, and failure to warn resulted in the injury and death of plaintiffs' only child, Jeremy Flax.

The relationship of defendant to plaintiff

The relationship that the defendant had with the plaintiff was one of manufacturer to consumer. Plaintiffs were consumers who put their faith and trust in DaimlerChrysler to manufacture and sell a safe family vehicle. The plaintiffs were not privy to crash tests and reports that were prepared by DaimlerChrysler highlighting the problem with yielding seats in its minivans. On the contrary, plaintiffs relied solely on information that DaimlerChrysler gave them, and were dependent on DaimlerChrysler to design a safe vehicle and to warn of any problems of which it knew about.

The Court is of the opinion that DaimlerChrysler's reprehensible conduct of concealing and not warning customers of the known dangers of putting children behind yielding seats supports a substantial jury award.

3. The Defendant's IN4 are less of the Amount of Harm Being caused and the Defendant's Motivation in Causing the Harm:

The Court finds that DaimlerChrysler was aware of the injuries and deaths caused by the yielding seat backs. DaimlerChrysler had numerous complaints that put them on notice that people were being injured by these seats. DaimlerChrysler's own experts even admitted that in rear impact collisions, the seat backs would go backwards and children would be injured or killed.

The motivation for DaimlerChrysler's conduct was to avoid spending the extra money to fix the problem of a weak seat back design. DaimlerChrysler's documents reflect that installing a dual recliner, which would double the seat strength, would have added seven dollars to the cost of each of the front seats. The Court finds that this factor supports a high punitive damages award.

4. The Duration of the Defendant's Misconduct and Whether Defendant Attempted to Conceal the Conduct:

DaimlerChrysler has had the same type of yielding seat in its minivan for over 20 years. Since the 1980's, DaimlerChrysler has been bracing its seats to avoid injuring instruments and equipment in the back seat. In addition, there have been complaints and claims filed with DaimlerChrysler's call center dating back from the 1980's reporting incidents of seat back failure in its minivans. This evidence shows that for many years now DaimlerChrysler has had knowledge of the yielding seat backs, and the injuries caused to adults and young children due to the seat back design.

Testimony at trial also revealed that DaimlerChrysler attempted to conceal the information about its seat backs from the public. After the Minivan Safety Leadership Team identified its concern with the yielding seat backs, DaimlerChrysler's response was to retrieve and destroy all the team's minutes that pertained to seat back design. Further, Eric Clark, a DaimlerChrysler executive, testified at trial in Phase II that the public "does not have a right to know everything" that DaimlerChrysler knew. (11/23/04 T. 97/2-11),

He also stated that consumers did not have a right to know "what DaimlerChrysler knew about the dangers and risks." (Id. at 98/10-18),

The court is of the opinion that the duration of the misconduct and the fact that DaimlerChrysler attempted to conceal the misconduct warrants punitive damages in this case.

5. The Expense Plaintiff Has Borne in the Attempt to Recover Its Losses:

The Court is of the opinion that this case has been very expensive to try. Plaintiff's expert testified at trial that he was being paid approximately \$200,000 by plaintiff's counsel in connection with his work on this case. In addition, the bulk of plaintiffs trial team was from out of town and they have borne significant travel expenses from the month long trial. The Court finds that the plaintiff's expenses are in the hundreds of thousands of dollars and should be taken into consideration when computing the punitive damage award.

6. Whether Defendant Profited From the Activity, and If Defendant Did Profit, Whether tine

Punitive Damages Award Should Be in Excess of the Profit in Order to Deter Similar Future Behavior:

DaimlerChrysler profited by not making both of its front seats dual recliners. In the 1980's, DaimlerChrysler noted that to redesign the seat backs to prevent them from collapsing would result in a "piece penalty", which would be an increase in cost to change the design. Therefore, the Court finds that DaimlerChrysler did profit from choosing not to change the seat back design. This factor weighs in favor of a considerable punitive damages award.

7. Previous Punitive Damages Awards Based Upon The Same Wrongful Act:

Daimler Chrysler and the plaintiffs jointly consented not to charge the jury on this factor. DaimlerChrysler filed previous punitive damage awards under court ordered seal. The Court retains the sealed document to be opened at a later date once the litigation ends.

8. Whether, Once the Misconduct Became Known to the Defendant, Defendant Took Remedial Action Or Attempted to Make Amends By Offering a Prompt and Fair Settlement for Actual Harm Caused:

There is no evidence that DaimlerChrysler offered a prompt and fair settlement for the actual harm caused. Since this Court knows of no evidence of offers to settle, this factor weighs in favor of the plaintiff for an award of punitive damages.

9. Any Other Circumstances Shown By the Evidence That Bear On Determining the Proper Amount of the Punitive Award:

The Court is of the opinion that the punitive damages award should be reduced to 20 million dollars, a remittitur of 78 million dollars. It has been suggested by the United States Supreme Court that the ratio of punitive damages to compensatory damages should not be greater than 10 to 1. BMW of North America v. Gore, 517 U.S. 559, 581 (1996) (quoting Pacific Mut. La Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991)). The Supreme Court stated, “[s]ingle-digit multipliers are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution....” State Farm v. Campbell, 538 U.S. 408, 425 (2003). Although the United States Supreme Court decided that it would be unable to draw a mathematical bright line rule between the constitutionally acceptable and the constitutionally unacceptable, the “general concer[n] of reasonableness...properly enter[s] into the constitutional calculus.” TX° Production Co v. Alliance Resources Corp., et al., 509 U.S. 443, 481 (1993)(quoting Haslip, 19 U.S., at 18)).

The difference between the punitive damages and compensatory damages in this case is 26 to 1. The wide gap between the two ratios is enough to make the Court raise a suspicious judicial eyebrow to the fact that the punitive damages awarded in this case do not comport with due process and are not within a constitutionally acceptable range.

The Court also notes that a lower ratio is appropriate when compensatory damages are substantial. In State Farm, the Supreme Court found that a punitive damages award of 145 million was not appropriate when the plaintiff received a substantial compensatory damages award. State Farm, 538 U.S. at 429. The Supreme Court stated,

“[w]hen compensatory damages are substantial, then a lesser ratio... can reach the outermost limit of the due process guarantee.” *Id.* at 425. In this case, the compensatory damage award was substantial and therefore, a remittitur to the punitive damage award is appropriate.

For these reasons, the Court finds that punitive damages are warranted and supported by the evidence in this case. However, the Court suggests a remittitur in the amount of 78 million dollars. The amount of punitive damages suggested by the Court assessed to DaimlerChrysler is 20 million dollars.

The plaintiffs are directed to draw the final order based on these findings of fact and conclusions of law.

ENTERED this 20th day of June, 2005,

/s/

JUDGE

HAMILTON

GAYDEN

APPENDIX D

IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE

JEREMY FLAX ET AL.

v.

DAIMLERCHRYSLER CORPORATION ET AL.

No. M2005-01768-SC-R11-CV

ORDER

The appellee, Daimler Chrysler Corporation (“DCC”), has filed a petition for rehearing of the opinion released on July 24, 2008. We have considered all of the arguments raised in the petition and have concluded that they are without merit. Accordingly, the petition for rehearing is denied.

Justice Koch adheres to his conclusions expressed in his separate concurring and dissenting opinion released July 24, 2008, that the record does not contain clear and convincing evidence to support the jury’s finding that DaimlerChrysler acted recklessly and that the admission of evidence regarding incidents involving third parties was not

harmless because it enabled the jury to punish DaimlerChrysler for injuries to persons who were not before the court. Accordingly, he would grant the petition for rehearing and reverse the judgments for both punitive and compensatory damages and remand the case for a new trial on the issue of compensatory damages.

Justices Clark and Wade continue to adhere to the views expressed in their separate opinions, also released on July 24, 2008.

In addition, the appellants Jeremy Flax and Rachel Sparkman have filed a motion asking this Court to condition any further stay of mandate upon DCC's posting a surety bond. Upon due consideration, the appellants' request to condition any further stay upon DCC's posting of a surety bond is hereby denied.

It is so ORDERED.

PER CURIAM

APPENDIX E

**In the
Supreme Court
of Tennessee**

**JEREMY FLAX and RACHEL SPARKMAN, as the
Natural Parents of Joshua Flax, deceased; RACHEL
SPARKMAN, individually, Plaintiffs and Appellants,**

v.

**DAIMLERCHRYSLER CORPORATION, Defendant
and Appellee, LOUIS A. STOCKELL, JR.,
Defendant.**

No. M2005-01768-SC-R11-CV

Davidson Circuit Court No.: 02C-1288

PETITION FOR REHEARING OF DAIMLERCHRYSLER CORPORATION

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**II. REHEARING IS WARRANTED BECAUSE
THE COURT FAILED TO ADDRESS TWO OF
DCC'S ARGUMENTS.**

Rehearing is also warranted for the simple reason that the Court has not yet addressed or ruled upon two of the arguments for reversal that DCC raised in its briefs.

First, at every stage of this litigation, DCC has argued that it is entitled to a new trial on punitive damages based on the improper jury arguments of Plaintiffs' counsel, who (a) urged the jury to punish DCC for its litigation conduct, (b) told jurors that they bore an "immense burden" to "keep children out of the hospitals and out of the morgues" and would bear personal responsibility for future deaths unless they returned a large award, and (c) argued—without a shred of evidence to support the outrageous accusation—that DCC had "conspired" with NHTSA to weaken federal regulatory requirements. DCC properly raised this argument in its post-trial brief (see 18 R. 3988-95), in the Court of

Appeals (see Ct. App. Br. 33-36; Reply Br. 17-18), and again in this Court. See DCC Op. Br. 30-32; Reply Br. 16-20. The Court of Appeals did not reach this issue (because the issue was pretermitted by that court's reversal of the punitive award on sufficiency-of-the-evidence grounds), but this Court's reinstatement of that award means that DCC's arguments are now ripe for adjudication. (This Court did not address this challenge in Section V of its opinion concerning "miscellaneous rulings of the trial court." See Maj. Op. 21.)

Under Tennessee law, DCC is entitled to resolution of this issue on the merits. Rule 36(a) of the Tennessee Rules of Appellate Procedure specifically provides that "[t]he Supreme Court . . . shall grant the relief on the law and facts to which the party is entitled or the proceeding otherwise requires." *Id.* (emphasis added). Furthermore, the advisory commission comments to Rule 13(a) explain that "[t]he propriety of granting relief is governed by Rule 36" and vest this Court with explicit and "plenary" authority to reach issues that were pretermitted by the Court of Appeals. *Id.* Simply put, the Court "shall" grant relief to DCC on issues (such as the challenge to the improper jury arguments) that DCC has preserved below and properly raised in its briefs to this Court.⁶

⁶ Although an appellate court may decline to grant a party's request for relief if that party (1) invited the error or (2) failed to preserve the issue, see TENN. R. APP. P. 36(a), TENN. R. APP. P. 13(a), adv. comm. comments, neither exception is applicable here.

Indeed, DCC submits that the Court's attention to this issue is particularly warranted in light of the fact that four members of this Court have *already* found that the trial was marred by the erroneous admission of the 25 post-sale incidents. See Maj. Op. 20-21; Koch. Op. 8-9 (error not harmless); Clark Op. 2-3 (error not harmless). The challenged arguments were incredibly inflammatory and improper—there is simply no place in Tennessee courtrooms for the argument that jurors will bear personal responsibility for placing children in morgues unless they return a nine-digit verdict—and Plaintiffs tellingly do not even purport to defend some of these arguments in their briefs. There can be no question but that these improper arguments enhanced the prejudice to DCC and provide an additional basis for ordering a new trial on punitive damages. What's more, the challenged arguments also provide an independent (and plainly preserved) basis for reversal under *Philip Morris USA v. Williams*, 127 S.Ct. 1057 (2007). *See also* Part III.B *infra*.

Second, DCC has also argued at every stage of this litigation that it is entitled to a new trial on all issues due to Plaintiffs' repeated, improper references to *additional* "other incidents" beyond the 37 that were admitted into evidence at trial. DCC properly raised this argument in its post-trial brief (see 18 R. 3955-61), in the Court of Appeals (see Ct. App. Br. 30-33; Reply Br. 16-17), and again in this Court. *See* DCC Op. Br. 50-52; Reply Br. 7-9. (This Court did not address this issue in Section V of the opinion. *See* Maj. Op. 21.)

To be clear, DCC's challenge as to this issue is entirely distinct from its argument that the trial

court abused its discretion and applied the wrong evidentiary standard when admitting Plaintiffs' other-incidents evidence. The point here is that, even if those 37 incidents (or the 12 pre-sale incidents) were properly admitted, Plaintiffs engaged in obvious misconduct and violated multiple court orders by repeatedly suggesting to the jury that it should assume there were *additional* incidents *beyond* those 37 in which children were killed or injured. Multiple courts have deemed such arguments to constitute reversible error. See, e.g., *Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496, 503-05 (8th Cir. 1993); *Wheeler v. John Deere Co.*, 862 F.2d 1404, 1406-09 (10th Cir. 1988); *GMC v. Moseley*, 447 S.E.2d 302, 306-07 (Ga. Ct. App. 1994).

III. REHEARING IS WARRANTED BECAUSE THE COURT'S LEGAL ANALYSIS CONFLICTS WITH PRIOR DECISIONS AND RELIES UPON MATTERS THAT DCC HAS NOT HAD AN OPPORTUNITY TO ADDRESS.

* * *

C. The Court's Finding That DCC Waived Its Third-Party Harm Objection Conflicts With Prior Decisions And Rests On New Legal Propositions That DCC Has Not Had An Opportunity To Address.

DCC argued that it is entitled to a new trial on punitive damages under *Philip Morris*, see DCC Op. Br. 28-29, 30-31, but three members of the Court

declined to grant relief on that issue. *See* Maj. Op. 17-18. Although the majority acknowledged that “DCC requested that the jury be instructed that it could not punish DCC for harm suffered by nonparties” and that “the trial court declined to give this instruction,” the Court found that DCC had failed to preserve the issue by not raising an instructional-error challenge in its briefs to the Court of Appeals: “Unfortunately, DCC did not question the rejection of its proposed instruction in the Court of Appeals. . . . Litigants who hope to have an issue heard by this Court must first present that issue to the intermediate appellate court.” *Id.* The Court characterized *Philip Morris* as a case holding that “[u]pon motion by the parties, trial courts are required to instruct the jury that it . . . should not directly punish defendants for harm to nonparties.” *See id.* at 18 n.9 (emphasis added).

This reasoning is subject to rehearing because it conflicts with other decisions and because DCC has not had an opportunity to address it. First, the Court’s characterization of *Philip Morris* as a case solely concerned with jury instructions is too narrow. That case holds that when “the sort of evidence” presented at trial and “the kinds of arguments the plaintiff made to the jury” create a risk of punishment for third-party harm, the trial court “must protect against that risk” upon request by the defendant. 127 S.Ct. at 1060, 1065. Although jury instructions are certainly one type of protection that trial courts can provide, they are not the *only* type of protection. Indeed, *Philip Morris* itself explains that “the States have some flexibility to determine what kind of procedures they will implement” and thus “federal constitutional law obligates them to provide some form of protection in appropriate cases.” *Id.* at

1065 (emphasis in original). Here, DCC's requests at trial for protection from third-party punishment were not limited to requests for jury instructions—DCC also repeatedly asked the trial court to impose limitations on Plaintiffs' other-incidents *evidence* and to limit Plaintiffs' prejudicial *arguments* about third-party harm and future deaths. Furthermore, it is undisputed that DCC raised these evidentiary and argument challenges in its briefs to the Court of Appeals and to this Court (thus obviating any claim of waiver). This was sufficient to require a new trial on punitive damages under *Philip Morris. Holdgrafer*, 160 Cal. App. 4th at 933-34 (ordering new trial on punitive damages, even though defendant did even not request third-party harm instruction at trial, due to admission of *evidence* that posed risk of punishment for such harm).

Second, even if DCC's complaint under *Philip Morris* were viewed solely as a complaint about the jury instructions (and it is not), the Court's finding that DCC failed to preserve that challenge is contrary to Tennessee law. Tennessee's preservation rules are rooted in concerns of judicial economy. As the advisory commission comments to Rule 13(a) explain, it is "[o]rdinarily" the rule that "the Supreme Court will refuse to consider an issue not presented to the intermediate appellate court because, as stated in Rule 36, the party raising the issue has failed to take action reasonably available to nullify the error presented by the issue." *Id.* (emphasis added). Here, however, it cannot be said that DCC "failed to take action . . . to nullify the error," for the simple reason that the Court of Appeals would not have reached the instructional-error issue even if DCC had raised that issue in its briefs to that court. Because the Court of Appeals

reversed the punitive award for insufficient evidence, any complaint of instructional error would have been pretermitted. Therefore, because DCC (1) raised the instructional-error issue at trial and in its post-trial brief, and then (2) raised the issue before the only appellate court to reach the issue, the Court should find the issue preserved under Rules 3(e), 13(a), and 36. Even if it is "ordinarily" the case that the Court will not consider an issue that was not directly presented to the Court of Appeals, the factual and procedural circumstances demonstrate that that "ordinar[y]" rule is not applicable here.⁷

* * *

DATED: August 4, 2008
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⁷ The cases cited in the Court's opinion are not to the contrary, as both involved situations where an appellant *lost* before the Court of Appeals and then sought to raise a new argument (which the Court of Appeals would have reached and resolved had the issue been presented) during the Supreme Court proceedings. *See Brown v. Crown Equip. Corp.*, 181 S.W.3d 268 (Tenn. 2005); *Va. & Sw. R.R. Co. v. Sutherland*, 197 S.W. 863 (Tenn. 1917).

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APPENDIX F

**In the
Supreme Court
of Tennessee**

JEREMY FLAX and RACHEL SPARKMAN, as the Natural Parents of Joshua Flax, deceased; RACHEL SPARKMAN, individually, Plaintiffs and Appellants,

v.

DAIMLERCHRYSLER CORPORATION, Defendant and Appellee, LOUIS A. STOCKELL, JR., Defendant.

No. M2005-01768-SC-R11-CV

Davidson Circuit Court No.: 02C-1288

BRIEF OF APPELLEE DAIMLERCHRYSLER CORPORATION

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**ORAL ARGUMENT REQUESTED
ARGUMENT**

**I. DCC IS ENTITLED TO JUDGMENT ON
PUNITIVE DAMAGES.**

**B. The Punitive Damage Award Also
Violates Due Process.**

This Court should affirm the Court of Appeals' grant of judgment to DCC on punitive damages, but in the alternative, this Court should vacate the award and grant DCC appropriate relief because the jury's determination of punitive damages was tainted by numerous constitutional errors.

**1. Imposing Punitive Damages in This Case
Would Deprive DCC of Fair Notice and Render
Tennessee Law Unconstitutionally Vague.**

To permit DCC to be punished despite objective indicia of reasonable conduct, such as compliance

with federal safety standards and industry custom, would expand liability for punishment under Tennessee law, thereby depriving DCC of the "fair notice" required by the Constitution. *See State Farm*, 538 U.S. at 417 ("[E]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the conduct that will subject him to punishment.") (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996)); *see also Philip Morris*, 127 S.Ct. at 1062 (emphasizing fair notice principles); *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964) (there is a "potentially greater deprivation of the right to fair notice . . . where . . . a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction, than in the typical 'void for vagueness' situation"). As the Court put it recently in *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *Id.* at 703 (quotation omitted).

Indeed, permitting a defendant to be punished for designing a product in full compliance with on-point federal safety standards and industry custom, and where reasonable people could disagree as to the design's lawfulness, would render Tennessee's punitive damage law unconstitutionally vague as applied to the facts of this case. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (due process requires "the kind of notice that will enable ordinary people to understand what conduct [a law] prohibits"); *United States v. Powell*, 423 U.S. 87, 93 (1975). Such a purely subjective approach would not only conflict with the clear language of *Hodges* and the Tennessee

statutes identifying compliance with government standards and industry custom as relevant to the defect inquiry, but would depart from the traditional common-law rule that objectively reasonable conduct is not "reckless" and therefore is not punishable. *Safeco*, 127 S.Ct. at 2215; *see also Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490 (1915) (civil penalty violated due process where defendant was "well justified in regarding [its conduct] as reasonable and in acting on that belief" and even assuming that defendant "should have known that the Supreme Court of the State . . . might hold the [conduct] unreasonable"). Eliminating this traditional common-law protection against arbitrary punishments would violate due process. *See, e.g., Oberg*, 512 U.S. at 430 (overturning Oregon system that departed from common-law punitive damage practice).

2. Contrary to *Philip Morris v. Williams*, the Trial Court Allowed the Jury to Punish DCC for Alleged Harms to Non-Parties.

In its recent decision in *Philip Morris*, the U.S. Supreme Court vacated a \$79.5 million punitive damage award because the plaintiff's attorney had asked the jury to consider the number of other consumers harmed by the defendant's conduct and to impose punishment based on such harm to non-parties. 127 S.Ct. at 1061 ("the plaintiff's attorney had told the jury to 'think about how many other Jesse Williams in the last 40 years in the State of Oregon there have been'"). The Court rejected this tactic as unconstitutional, explaining that "to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation" and would pose enormous "risks

of unfairness" as well as "risks of arbitrariness" and "concern[s] for adequate notice." *Id.* at 1063-64.

The *Philip Morris* Court further noted that, at trial, the defendant had proposed a jury instruction that would have forbidden the jury from imposing punishment based on harm to non-parties. The Court held that the trial court's rejection of this instruction required reversal of the punitive damage award. *See id.* at 1065 (holding that "a court, upon request, must protect against that risk," and that the resulting error "may lead to the need for a new trial").

Philip Morris compels reversal here, too. At trial, DCC proposed a "third party harm" jury instruction similar to the instruction proposed but rejected by the lower courts in *Philip Morris*. *See* 15 R. 3615 (DCC's proposed instruction No. 22: "you may consider only the harm to the plaintiff in this case" and "if you decide to award any punitive damages, your award must be limited to redressing the injuries incurred only by the plaintiff in this lawsuit"); 17 R. 3801. However, the trial court refused to give this instruction during either phase of trial. 11/17 Tr. 208; 11/23 Tr. 25.¹⁵

¹⁵ At the charge conference, Plaintiffs urged the court not to give this and other instructions proposed by DCC because they were "simply . . . strategic so if down the road they will have preserved their constitutional claims and their arguments on those issues." 11/17 Tr. 207.

In addition, during summation, Plaintiffs' counsel made the same type of arguments that the Supreme Court condemned in *Philip Morris*. Plaintiffs repeatedly invited the jury—over DCC's objection—to punish DCC for its conduct toward, and the harm suffered by, third parties not before the Court. Among other things, counsel ticked off the names of other purported third-party victims; claimed that DCC should be punished for the "other people" who were "dead . . . and injured"; and argued that only by "drop[ping] the hammer" on DCC could the jury prevent more deaths.¹⁶ Counsel even exhorted the jury to calculate its \$98 million punitive award by assessing a \$14 penalty (based on the cost

¹⁶ See, e.g., 11/18 Tr. 130-32 (claiming the "issue in this case [is] the weak seat backs that have killed and injured a lot of people," and that "Joshua Flax is not a statistic. Nor is Christopher Buss or Jasmine Chism or Connor Corrigan or Evan Bridge or Emily Neal or Morgan Dize or Leatu Collins or any of the others on that list of OSIs you've heard about or any of the adults"); 11/23 Tr. 209-11 ("You have a chance . . . to get done what DaimlerChrysler Corporation has refused to even try to do. [Objection overruled]. And that is to keep children out of the hospitals and out of the morgues. We ask that you drop the hammer on them and that you render a verdict that is not just likely and not just hopefully enough to stop it, but beyond a shadow of a doubt is enough to stop it."); See also 11/18 Tr. 132-33 ("[W]hat this case is about" is that "if they had fixed it . . . none of these other people would be dead and none of these other people would be injured"); *id.* at 148-49 ("The reason to impose punitive damages" is so DCC "doesn't injure or kill people in Tennessee"), *id.* at 150-51 ("the sad truth is that the only way to stop this kind of conduct is punitive. . . . People and children continue to be killed and will continue to be killed."); 11/23 Tr. 192-3 ("sympathy is not going to stop the killing and injuring of innocent people").

of replacing NS seats with RS seats) for each of the seven million minivans that DCC sold to third parties in other transactions. 11/23 Tr. 203-05.

Thus, even more so than in *Philip Morris*, "the sort of evidence that was introduced at trial [and] the kinds of argument the plaintiff made to the jury" created "an unreasonable and unnecessary risk" that the jury acted at least "in part" out of a "desire to punish [DCC] for harming persons who are not before the court." 127 S.Ct. at 1060, 1065. See also *id.* at 1065 ("How can we know whether a jury, in taking account of harm caused others under the rubric of reprehensibility, also seeks to *punish* the defendant for having caused injury to others?"). Accordingly, the punishment here must be vacated.

3. The Punitive Damage Award Was Further Tainted by Additional Baseless, Irrelevant and Inflammatory Evidence and Arguments.

Plaintiffs did not merely invite the jury to punish DCC for harm to non-parties, in violation of *Philip Morris*. Counsel also made a number of other improper and inflammatory arguments at trial. These tactics induced the jury to act with bias, passion, and prejudice, rather than carefully evaluate DCC's conduct, and encouraged the jury to impose punishment based on other impermissible and unconstitutional factors.

Punishment For Litigation Strategy:

Counsel argued, over DCC's objection, *see* 11/23 Tr. 33; 18 R. 3988-91, that the jury should punish DCC for its litigation strategy—including its decision not to call any DCC executives to testify. *See* 11/18 Tr. 92 ("Not a single executive of the DaimlerChrysler Corporation has come before you to explain their

conduct Somebody is going to have to wake them up. Only you can do that. We're going to ask that you vote yes on punitive damages.").¹⁷ Such argument is improper because a defendant cannot be punished for its litigation strategy or in-court tactics, neither of which has any bearing on "the acts upon which liability was premised." *State Farm*, 538 U.S. at 422-24.¹⁸

Jurors' Personal Responsibility For Future Deaths:

Deaths: Counsel also repeatedly told the jurors, over DCC's objection, *see, e.g.*, 11/23 Tr. 210; 18 Tr. 3991-92, that if they did not impose a substantial punitive damage award, they would be personally responsible for the deaths of children and other individuals. *See* 11/23 Tr. 210 ("You have a chance, ladies and gentlemen, to get done what DaimlerChrysler Corporation has refused to even try to do. And that is to keep children out of the hospitals and out of the

¹⁷ *See also* 11/18 Tr. 55-56 ("[I]f you're not willing to bring any of your own employees to court to defend the product, that sort of says it all."); 11/18 Tr. 92 ("Whether the corporation is willing to answer to you is up to them. Evidence is pretty clear, the answer is no. You have not heard from a single employee of the DaimlerChrysler Corporation."); 11/18 Tr. 66 ("There is nobody here from DaimlerChrysler to even hear your verdict except lawyers."); 11/23 Tr. 191; 11/23 Tr. 192, 11/23 Tr. 209.

¹⁸ Many courts have explicitly held that "a defendant's trial tactics and litigation conduct may not be used to impose punitive damages in a tort action." *De Anza Santa Cruz Mobile Estates Homeowners Ass'n v. De Anza Santa Cruz Mobile Estates*, 94 Cal. App. 4th 890, 918 (2001). *See also* *Sobley v. Southern Natural Gas Co.*, 302 F.3d 325, 341-42 (5th Cir. 2002); *Whitehead v. Food Max of Mississippi, Inc.*, 163 F.3d 265, 276-77 (5th Cir. 1998).

morgues."); 11/18 Tr. 66 ("[I]f not you, maybe in the future, there will be an opportunity for some lawyers and clients who have lost somebody to come before another jury and maybe they will do it. If that's the way it gets handled in the future, there will be people dead and injured between today and then.").¹⁹ This was plainly improper and inflammatory argument. See *Philip Morris*, 127 S.Ct. 1057; cf. *Illinois v. Holman*, 469 N.E.2d 119, 133-35 (Ill. 1984) (improper to invoke "virtually . . . guarantee[d]" deaths of "future innocent victims" because such remarks "ha[ve] no function other than to appeal to the passions and fears of the jury"); *Sherman v. Nevada*, 965 P.2d 903, 914-15 (Nev. 1998) ("improper" to "ask[] the jury to . . . align themselves

¹⁹ See also 11/18 Tr. 65 ("[DCC] hopes you will do so little that what you do will make no difference and then they will escape. You know the consequences of that; because of some dispute, more are going to die and be injured."); 11/23 Tr. 210 ("When you leave this courtroom after it is all over, you're going to have to ask yourselves, why were you here? And not to put too much of a burden on you, but the burden is immense. For the rest of your lives, you're going to have to ask yourself the question, did I do enough?"); 11/18 Tr. 66 ("The deaths and the injuries will continue until . . . some jury says no more. Put a stop to it."); 11/23 Tr. 195 ("[M]ore will be killed and more will be injured. And we don't know of another instrumentality that has the opportunity to stop it other than you or some day in the future some other jury after somebody else has been killed or badly hurt."); 11/18 Tr. 66 ("[Y]ou can't stop all the deaths and injuries on the roadways. That's true. We all know that is true. But you can, somebody can stop some of them, and the somebody is you."); 11/18 Tr. 85 ("Going after Stockell is not going to solve anything. It is not going to stop killing and injuring.").

with future innocent victims" because such "rhetorical excess" is "extremely inflammatory").

Alleged NHTSA Conspiracy: Finally, and again over DCC's objection, see 11/17 Tr. 241-42, 248; 18 R. 3992-95, counsel told the jurors that "NHTSA belongs to the automakers." 11/16 Tr. 89; 11/17 Tr. 25; 11/18 Tr. 79, 135-36, 143-44. Counsel also told the jurors, again and again, that a massive punitive damage award was necessary because "NHTSA is not going to do anything." *See, e.g.*, 11/18 Tr. 89.²⁰ Such argument violates *State Farm, Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000), and *Buckman v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001), because it invites the jury to act as a national regulator and attacks the integrity of the federal safety agency.

* * *

²⁰ *See also* 11/18 Tr. 79 ("NHTSA has closed the investigation and said we're not going to do anything. What does that mean to you and to this case? It is up to you. Nobody else is going to do anything."); 11/23 Tr. 183 ("[T]he fact that NHTSA has never required a recall of a design defect unless a manufacturer agreed to it is huge. That, too, tells it all. It is up to you."); 11/18 Tr. 134-35 ("[W]hether you like others in the legal profession or not, who is doing anything in this country about automotive safety? Certainly, is not [NHTSA]."); 11/18 Tr. 78 ("The most important thing to remember about NHTSA is this. What the evidence means is the government is not going to do anything for anybody else."); 11/23 Tr. 39 ("It is undisputed in this case that no safety agency is going to do anything about [the alleged defect].")

5. The Punitive Damage Award is Unconstitutionally Excessive.

At a minimum, this Court must enter a substantial remittitur of the punitive damage award under the “exacting” *de novo* review standard mandated by *State Farm*. The award is excessive as a matter of federal constitutional law, as well as under Tennessee standards. The Sixth Circuit’s decisions in *Clark v. Chrysler Corp.*, 436 F.3d 594 (6th Cir. 2006), which applied *State Farm* to reduce a punitive damage award against Chrysler to achieve a 2-to-1 ratio, and *Chicago Title Ins. Corp. v. Magnuson*, 2007 U.S. App. LEXIS 11883, *41 (6th Cir. May 21, 2007), which reversed a \$32 million punitive award in its entirety because “the fact that First American acted maliciously is insufficient to support a finding that First American’s behavior was sufficiently reprehensible for an award of punitive damages,” further demonstrate the award in this case must be remitted or vacated.

* * *

Ratio. *State Farm* establishes that the ratio of punitive to compensatory damages in this case—still 8-to-1 after the trial court’s remittitur, and over 5-to-1 even if the NIED damages are included—is unconstitutional. *State Farm* holds that where “compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.” 538 U. S. at 425 (emphasis added).

Because the compensatory award in this case was undeniably “substantial”—and indeed far higher than the \$1 million compensatory award in *State Farm*—a 1-to-1 ratio is thus the maximum the Constitution permits. *See, e.g., Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 602-03 (8th Cir. 2005) (although defendant’s conduct was “highly reprehensible,” a 1-to-1 ratio is the constitutional maximum where compensatory damages are \$4,025,000); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 798-99 (8th Cir. 2004) (reducing \$6 million punitive award to \$600,000 to achieve 1-to-1 ratio); *Bach v. First Union Nat’l Bank*, 486 F.3d 150 (6th Cir. 2007) (reducing \$2.6 million punitive award to \$400,000 to achieve 1-to-1 ratio); *Jet Source Charter, Inc. v. Doherty*, 148 Cal. App. 4th 1 (2007) (reducing \$26 million punitive award to \$6.5 million to achieve 1-to-1 ratio). *See also Clark*, 436 F.2d at 606-07 (where compensatory damages were \$235,629, a 2-to-1 ratio is the constitutional maximum).²³

²³ Moreover, in *State Farm*, the Court recognized that a lower ratio is appropriate where the compensatory damages “likely were based on a component which was duplicated in the punitive award,” such as pain and suffering or emotional distress damages. 538 U.S. at 426. Here, Rachel Sparkman was awarded \$1,250,000 million for NIED—and then an additional \$6,632,655 in punitive damages based solely on that claim. Likewise, most of the wrongful death compensatory award was based on Joshua Flax’s pain and suffering rather than on lost wages.

Comparable Penalties. *State Farm* also requires courts to evaluate the excessiveness of punitive damage awards by reference to the awards “imposed in comparable cases.” 538 U.S. at 428 (quoting *Gore*, 517 U.S. at 575). Even after the trial court’s remittitur, the \$20 million award in this case is larger than the *combined total* of all prior punitive damage awards that have survived appeal in reported cases in Tennessee state courts.²⁴ The award is 10 times greater than the highest individual award ever to have survived appeal. *See Galde v. Keritsis*, 1999 WL 496630 (Tenn. Ct. App. July 15, 1999) (affirming \$2 million award).

Similarly, the relevant civil sanctions are dwarfed by the \$20 million penalty. *State Farm*, 538 U.S. at 428 (looking to “[t]he most relevant civil sanction under . . . state law for the wrong done”). At the time of the Caravan’s design and manufacture in 1998, the maximum civil penalty that could be imposed by NHTSA for a design defect was \$1,000 per vehicle, up to a maximum of \$800,000 for an entire fleet of defective vehicles. 49 U.S.C. § 30165(a) (1998).

Indeed, imposing \$20 million in punishment would raise the very federalism concerns identified in *Philip Morris*. Such a sum is “sufficiently large” that “it may impose one State’s (or one jury’s) ‘policy choice,’ say as to the conditions under which (or even whether) certain products can be sold, upon ‘neighboring States’ with different public policies.”

²⁴ Post-trial, DCC submitted a chart summarizing all prior punitive damage awards upheld in Tennessee, the accuracy of which Plaintiffs did not challenge. 18 R. 4021-30.

127 S.Ct. at 1062 (citations omitted). If the punitive award were replicated in the 49 other States, the aggregate punishment would total \$1 billion—far in excess of what anyone could reasonably consider a rational or appropriate national punishment.

* * *

DATED: July 18, 2007
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APPENDIX G

IN THE COURT OF APPEALS FOR THE STATE OF TENNESSEE MIDDLE SECTION AT NASHVILLE

JEREMY FLAX and RACHEL SPARKMAN, as the
Natural Parents of Joshua Flax, deceased; RACHEL
SPARKMAN, individually, Plaintiffs and Appellees,

v.

DAIMLERCHRYSLER CORPORATION, Defendant
and Appellant, LOUIS A. STOCKELL, JR.,
Defendant.

Appeal No.: M2005-01768-COA-R3-CV
Davidson Circuit Court No.: 02C-1288

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ORAL ARGUMENT REQUESTED

* * *

**III. IN THE ALTERNATIVE, THIS COURT
SHOULD ORDER A NEW TRIAL.**

**A. The Trial Court's Evidentiary Errors,
Combined With Plaintiffs' Counsel's
Misconduct, Prevented The Jury From Making
An Objective Assessment Of DCC's Design
Choice.**

* * *

**2. The irrelevant evidence and improper
argument concerning "other incidents."**

DCC was further prejudiced by the admission of irrelevant evidence concerning 37 "other incidents"

involving DCC vehicles. Many of these incidents did not take place under "substantially similar" conditions as the accident in this case, and most occurred *after* May 1998, when the Sparkmans purchased their minivan. To make matters worse, Plaintiffs' counsel inflamed the jury by suggesting, on multiple occasions, that DCC had suppressed evidence of *additional* "other incidents"—on top of the 37 already admitted by the trial court—in which children were injured or killed.

Factually Dissimilar Incidents: In a product liability case, evidence of other accidents supposedly resulting from the same alleged defect —also referred to as other similar incidents ("OSIs")—can be inflammatory and highly prejudicial. *Buckman v. Bombardier Corp.*, 893 F. Supp. 547, 552 (E.D.N.C. 1995). Consequently, Tennessee, like many other States, places strict limits on the admissibility of such evidence by requiring a threshold showing of substantial similarity. *See, e.g., Stroming v. Houston's Restaurant, Inc.*, 1994 WL 658542, at *1-3 (Tenn. Ct. App. Nov. 23, 1994); *Barrett v. Raymond Corp.*, 1991 WL 4996, at *1 (Tenn. Ct. App. Jan. 24, 1991); *John Gerber Co. v. Smith*, 263 S.W.2d 974, 977 (Tenn. 1924) (other accidents must have "occurred under substantially similar conditions" to be admissible).

In this case, the trial court held a pre-trial hearing at which it deemed 37 other accidents "substantially similar" to the Flax accident, and Plaintiffs proceeded to introduce evidence of them and base arguments on them. *E.g.*, 11/8 Tr. 203. But few, if any, of these incidents satisfied the foundational requirements for admissibility, even

when evaluated under the trial court's own "substantial similarity" standard:

[A] substantial similarity in this case would be [1] a rear-end collision [2] between two moving vehicles [3] with catastrophic injuries. . . . As far as the force is concerned, it would have to be [4] reasonably near the Delta V forces that happened in this case.

10/25 Tr. 232-33. For example, in five of the 37 OSIs, the occupant's injury was not caused by a rear-impact collision.¹² More than two-thirds of the 37

¹² In one OSI, the injuries were caused by a fire resulting from a ruptured fuel tank. PX830; 11/1 Tr. 114 (Butler). In two of the OSIs, the injuries were sustained during rollover accidents. PX790, 11/1 Tr. 63-65 (Amberson); PX808 11/1 Tr. 95-98 (Bennett). And in two more, the injuries were caused by front-impact collisions. PX795, 11/1 Tr. 67-70 (Baird); PX800, 11/1 Tr. 78-82 (Basa).

OSIs¹³ involved a vehicle that was "sitting still" or "completely stopped" at the time of the accident.¹⁴ Many of the OSIs involved only minor injuries: one involved a broken nose, Plaintiffs' Exhibit ("PX") 1250, 11/1 Tr. 211-12, and another a "cervical and LS strain" that Plaintiffs' expert conceded "doesn't sound serious." 11/8 Tr. 226; *see also* PX887, 11/1 Tr. 145-48.¹⁵ And Plaintiffs simply failed to provide evidence showing that most of the OSIs occurred at a Delta-V similar to the Delta-V in this case.¹⁶

¹³ See PX795 (Baird); PX796 (Bajalia); PX1237 (Berthelsen); PX666 (Bridwell); PX830 (Butler); PX849 (Cirka); PX1225 (Collins); PX730 (Dize); PX1246 (Jones); PX250 (Labelle); PX976 (McCloskey); PX977 (McCurdy); PX1252 (McMillan); PX985 (Middleton); PX1027 (Prestridge); PX774 (Rich); PX1039 (Robinson); PX1050 (Saucenda); PX1067 (Spires); PX1069 (Stanley); PX1081 (Toothaker); 10/27 Tr. 65 (Corrigan); 10/27 Tr. 86 (Comella); 10/27 Tr. 104 (Neal); 10/27 Tr. 123 (Chism).

¹⁴ Courts have suggested that "even a lay person can understand that" a collision between two moving vehicles is "not at all substantially similar to" a collision between a moving vehicle and a stationary vehicle. *See J.B. Hunt Transport, Inc. v. Gen. Motors Corp.*, 52 F. Supp. 2d 1084, 1089 (E.D. Mo. 1999).

¹⁵ See also PX790, 11/1 Tr. 63-65 (Amberson); PX979; 11/1 Tr. 171-73 (McNeely); PX985, 11/1 Tr. 173-74 (Middleton); PX830, 11/1 Tr. 114 (Butler); PX1243, 11/1 Tr. 210 (Hanifee); PX849, 11/1 Tr. 127-29 (Cirka); PX800, 11/1 Tr. 78-82 (Basa); PX808, 11/1 Tr. 95-98 (Bennett); PX771-72, 11/1 Tr. 56-57 (Persak); PX666; 10/27 Tr. 52-56 (Bridwell); PX922, 11/1 Tr. 158-60 (Henkel); PX1027, 11/1 Tr. 181-82 (Prestridge); PX1050, 11/1 Tr. 185-86 (Saucenda), PX1069, 11/1 Tr. 188-90 (Stanley).

¹⁶ In five instances, Plaintiffs failed to demonstrate the speed at which *either* vehicle was traveling at the time of the accident. *See* PX827 (Buss); PX1243 (Hanifee); PX944 (Kinsey); PX973

This gravely prejudiced DCC. Indeed, even if *most* of the 37 OSIs were properly admitted, the erroneous admission of just a few would still warrant reversal.¹⁷

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(Martin); PX771-72 (Persak). In 15 other instances, DCC merely had notice that a stationary vehicle had been struck by a vehicle traveling at an unknown speed. See PX796 (Bajalia); PX830 (Butler); PX849 (Cirka); PX1225 (Collins); PX729-32 (Dize); PX1246 (Jones); PX1250 (Labelle); PX976 (McCloskey); PX1252 (McMillan); PX979 (McNeely); PX1039 (Robinson); PX1050 (Saucenda); PX1067 (Spires); PX1069 (Stanley); PX1081 (Toothaker). Two more OSIs involved a collision between a nearly-stationary vehicle and a vehicle traveling at an unknown speed. See PX800 (Basa); PX922 (Henkel). And even when Plaintiffs *did* provide Delta-V information, most of the OSIs were not substantially similar given the speeds and nature of the vehicles involved. For example, eight of the OSIs involved one stationary vehicle and one vehicle traveling at an excessive speed, often more than 50 or 60 miles per hour. See PX795 (Baird); PX1237 (Berthelsen); PX666 (Bridwell); PX776-78 (Chism); PX977 (McCurdy); PX985 (Middleton); PX1027 (Prestridge); PX774 (Rich). And in four of the OSIs, the vehicle that caused the rear impact was a heavy, dissimilar vehicle such as a tractor-trailer, bus, or "motor home towing another vehicle." See PX887 (Fortney); PX756 (Neal); 10/27 Tr. 86 (Comella); PX997 (Munoz).

¹⁷ DCC repeatedly and timely objected to the admission of the OSI evidence. See, e.g., 10/27 Tr. 19 (COURT: "[I]s there an objection on all of them?" DCC: "Yes, Your Honor."); 11/1 Tr. 47-48 ("renewing" DCC's "general objection" to Plaintiffs' admitted OSI evidence); 11/8 Tr. 203 (objection to Saczalski's claim that 37 incidents were substantially similar); 11/9 Tr. 83 ("As your Honor knows, we object to . . . even the 37 OSIs that have come in and we've cross-examined on them. We understand the Court has submitted them, but we want the record to be clear that we object . . ."). See also 17 R. 3949, 18 R. 3950-55 (post-trial motion).

See General Motors Corp. v. Lupica, 379 S.E.2d 311, 314-15 (Va. 1989) (reversing plaintiff's product liability verdict, even though "most" of the plaintiff's OSI evidence met "the 'substantial similarity' test," due to the "possibility of prejudice" resulting from the handful of improperly-admitted OSIs). Because "it [is] reversible error to admit [OSIs] in a products liability case without a 'showing of similarity,'" *Cooper Tire & Rubber Co. v. Crosby*, 543 S.E.2d 21, 23-24 (Ga. 2001), the verdict cannot stand. *See also Nissan Motor Co. v. Armstrong*, 145 S.W.3d 131, 140-43 (Tex. 2004) (vacating jury verdict in defect case because trial court admitted evidence of dissimilar car accidents).

Post-Sale Incidents: 25 of the alleged OSIs occurred after the Sparkmans purchased their Caravan—and some even occurred after the *accident* in this case. The timing of these OSIs is critical because, as Plaintiffs repeatedly confirmed throughout the trial and as the jury was instructed, Plaintiffs' OSI evidence was offered for the "strictly limited" purpose of showing that DCC had "notice" of the alleged defect.¹⁸ A post-sale OSI cannot establish

¹⁸ See, e.g., 10/25 Tr. 228 ("The OSIs are offered to prove the magnitude of the danger known to Chrysler."); 11/9 Tr. 32 ("It goes to their notice."); 11/15 Tr. 88 (arguing that police reports used as OSI evidence "are not offered to prove the truth of what's contained therein . . . [but] are offered to prove notice"); 11/23 Tr. 183 ("With respect to OSI, I'll say it again. The purpose of other similar incidents . . . is to prove that DaimlerChrysler was on notice. We can't offer them up unless it proves notice."). Plaintiffs again confirmed this position in their post-trial briefing. 32 R. 6506 ("These other similar incidents . . . were tendered and were admissible only to prove notice and knowledge of defect and danger."). *See also* 11/18 Tr.

such "notice" for the obvious reason that it occurred *after* the alleged tort was committed. *See Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1248 (10th Cir. 2000) (reversing verdict because other accidents "were incorrectly admitted to show notice, as they occurred after the incident at issue here").¹⁹

Accordingly, the 25 OSIs that occurred *after* the Sparkmans' Caravan was purchased in May 1998 are not relevant to any issue in this case, and should have been excluded. *See Tenn. Code. Ann. § 29-28-105(a)* (providing that a manufacturer may only be held liable for a product that is defective or unreasonably dangerous "at the time it left the control of the manufacturer or seller."); *Tenn. Code. Ann. § 29-28-105(b)* ("[T]he state of scientific or technical knowledge available to the manufacturer or seller at the time the product was placed on the market, rather than at the time of injury, is applicable."). In fact, this Court in *Irion v. Sun Lighting, Inc.*, expressly recognized "Tennessee's statutory prohibition on using post-sale developments to prove that a product was unreasonably dangerous when it was sold." 2004 WL 746823, at *13 (Tenn. Ct. App. Apr. 7, 2004).

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38 (jury instruction that OSI evidence could be considered for the "strictly limited" purpose of showing that DCC had "knowledge or notice of the alleged defect").

¹⁹ DCC objected to the admission of post-sale OSIs at trial and in its post-trial motion. 11/1 Tr. 107 ("continuing objection" to "the incidents that come after Flax"); 18 R. 3953-55 (post-trial motion).

Admission of these OSIs violated *Irion* and Tennessee's product liability statute.²⁰

The admission of six OSIs that occurred after the Flax *accident* cannot be justified under *any* theory. In *Irion*, this Court held such post-accident evidence irrelevant, stating that "we fail to see how the August 1997 . . . efforts . . . [are] at all relevant to the fire that happened in February 1997." 2004 WL 746823, at *9 n.9. See also *Smith*, 214 F.3d at 1248.²¹

²⁰ In its post-trial order, the trial court stated that these post-sale OSIs were properly admitted (1) because post-sale evidence is admissible "on the issue of feasibility" and (2) because "Tennessee law allows other similar incidents to be admitted into evidence that occurred both before and after the incident took place." App. 49, 40 R. 7815. Neither explanation is persuasive. First, post-sale evidence may be admitted to show feasibility only "if that issue were controverted by the defendants," *Irion*, 2004 WL 746823, at *14 n.14—which was not the case here. Second, although post-sale OSIs may be admissible in Tennessee in some circumstances to prove *dangerousness* or *defect*, they are not admissible when, as here, they are offered for the "strictly limited" purpose of proving notice.

²¹ Nor were the OSIs the only form of evidence that the trial court improperly admitted to prove "notice." Over DCC's repeated objection, see 10/25 Tr. 187, 11/9 Tr. 110-11, 11/10 Tr. 47-49, 18 R. 3965-66 (post trial motion), the trial court admitted evidence concerning two episodes of the television program "60 Minutes," based on Plaintiffs' claim that these episodes gave "notice" to DCC of a problem that DCC failed to fix. 11/3 Tr. 51-55, 11/9 Tr. 55-57, 112, 11/10 Tr. 34-35, 46-49. Yet the first episode—which aired in the early 1990s—did not mention, let alone criticize, the seat used by Chrysler. See *Gardner v. Chrysler Corp.*, 89 F.3d 729, 737 (10th Cir. 1996) ("[T]he 60 Minutes feature . . . involved Chrysler's competitors' vehicles

Counsel's Suggestion that DCC Suppressed Additional Incidents: Prior to trial, DCC asked the trial court to make a definitive ruling on the precise number of admissible OSIs because DCC suspected that Plaintiffs would "try[] to create the inference there are others" and suggest to the jury that "there were other ones out there we prevented [Plaintiffs] from getting in." 11/1 Tr. 40-41. Plaintiffs wasted no time in confirming DCC's suspicions. In their opening statement, after emphasizing the importance of OSIs, Plaintiffs told the jury that although "[y]ou're going to hear about a bunch of them [t]here is no way to know for sure how many times Chrysler or DaimlerChrysler seat backs have collapsed in wrecks." 11/3 Tr. 46-48. And again, on three separate occasions during the direct examination of Saczalski, Plaintiffs asked suggestive questions that implied the existence of more than 37 OSIs. See 11/9 Tr. 76-77 ("[D]o you know for a fact that only three children have been killed by these collapsing seats?"); 11/9 Tr. 77 ("Do you know for a fact that DaimlerChrysler has really produced all of the information for all of the incidents that it has?"); 11/9 Tr. 77-78 ("Do you know for a fact that there were only 40 other incidents where people were killed or injured by these collapsing minivan seats in circumstances similar to this?").

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but no Chrysler minivan products."). And the second episode did not air until the late 1990s or early 2000s—that is, *after* the sale of the Sparkmans' minivan. 11/9 Tr. 110-12. Accordingly, both episodes should have been excluded.

After DCC's third objection, *see* 11/9 Tr. 76-81, the trial court denied DCC's motion for mistrial but issued an order "direct[ing] you [i.e., Plaintiffs' counsel] not to ask any more questions about it." 11/9 Tr. 82. Yet Plaintiffs ignored this and other orders,²² stating during the Phase I closing argument that "the weak seat backs . . . have killed and injured a lot of people" and that "*[t]here is no evidence from DaimlerChrysler Corporation that those 37 are the only ones killed and injured.*" 11/18 Tr. 131-32 (emphasis added). DCC immediately moved for a mistrial, which was denied. 11/18 Tr. 132. Plaintiffs then continued with their improper argument, telling the jury: "*It is a lie. There is no evidence that there have only been three deaths.*" 11/18 Tr. 132 (emphasis added).

As Phase II began, Plaintiffs picked up exactly where they left off. Counsel asserted in opening statement that "*[t]here is no evidence . . . that [DCC] has ever made any attempt whatsoever to find out how many adults and children have been killed and injured as a result of these collapsing seat backs.*" 11/23 Tr. 40. DCC objected, and the Court ordered Plaintiffs to "[g]o on to something else." 11/23 Tr. 40. But Plaintiffs again refused to comply, instead cross-examining a DCC witness by asking: "So you, as you sit here today, have really no idea how many

²² At DCC's request, *see* 15 R. 3462-65, the trial court issued another order requiring that "[a]ny questions related to OSIs over and above the 37 that the Court has already admitted as substantially similar, you'll have to approach the bench before you ask it." 11/15 Tr. 12. DCC also raised this issue in its post-trial motion. 18 R. 3955-61.

incidents of occupant-to-occupant contact or fatal-to-severe injuries from collapsing seats in Chrysler minivans . . . are contained within Chrysler's own files." 11/23 Tr. 158. Finally, during the Phase II closing argument, Plaintiffs yet again suggested to the jury that there were far more than 37 OSIs, asserting that "[w]ith respect to OSI, . . . [t]he only ones we can . . . use are ones that DaimlerChrysler knew about." 11/23 Tr. 183.

The prejudice resulting from Plaintiffs' misconduct was undeniably severe. It not only left the jury with the false but immensely harmful impression that DCC's seat had caused numerous deaths and injuries, but also suggested that DCC had suppressed evidence that would have revealed the magnitude of the alleged safety hazard. Plaintiffs' misconduct inflamed the jury and infected the trial from start to finish, forcing DCC to alter its trial strategy in an attempt to remedy the improper allegations.²³

Courts regularly grant new trials in product liability actions where a plaintiff makes improper references to other incidents that have not been proved substantially similar—even under

²³ For example, in response to Plaintiffs' arguments, DCC was forced to draw further attention to the OSI issue during its Phase II opening statement. *See, e.g.*, 11/23 Tr. 52-54 ("The Court instructed you during the trial . . . that there are 37 substantially similar incidents, incidents for your consideration. It didn't come from me, it didn't come from Chrysler, and it didn't come from them. That came from Judge Gayden. So any type of inference that there were more of those was done to misdirect you and try to make you lose your way.").

circumstances far less egregious than presented in this case, where counsel flagrantly defied order after order from the trial court. *See, e.g., Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496, 503-05 (8th Cir. 1993) (reversing \$9 million verdict because the trial judge deemed *four* OSIs admissible, yet plaintiffs' counsel asked a defense expert "whether he was familiar with the other *nine* incidents" and then asserted during closing argument that "[w]e don't know how many other injuries there are"); *Wheeler v. John Deere Co.*, 862 F.2d 1404, 1406-09 (10th Cir. 1988) (reversing \$3.1 million verdict because the trial judge deemed *five* OSIs admissible, yet plaintiffs' counsel suggested during cross-examination of a defense witness that there had been *twenty-four* OSIs); *Barker v. Deere & Co.*, 60 F.3d 158, 165 (3d Cir. 1995) (reversing product liability verdict because the plaintiff's "opening and closing statement contained references to . . . other accidents which were not similar to the incident in which [the plaintiff] was injured"); *Mercer v. Pittway Corp.*, 616 N.W.2d 602, 616 (Iowa 2000) (reversing \$21.3 million verdict because plaintiffs referred to OSIs despite "fail[ing] in their burden of proving that all the consumer complaints . . . are substantially similar to the facts and circumstances of the Mercer fire").

This case is strikingly similar to *General Motors Corp. v. Moseley*, 447 S.E.2d 302 (Ga. Ct. App. 1994), a design defect case where the court reversed a \$105 million verdict because plaintiffs' counsel—the Butler, Wooten law firm—did exactly what it did here: make numerous improper references to other incidents that had not been shown to be substantially similar. Prior to trial, the *Moseley* court had directed that "there would have to be a showing of substantial similarity, outside the

presence of the jury, before any other case was mentioned." *Id.* at 307. Despite this order, the Butler, Wooten attorneys "repeatedly referred to 120 other lawsuits (and occasionally an estimated 240 deaths) during opening statement, examination and cross-examination of witnesses, and closing argument . . . without ever attempting to make the required showing of similarity." *Id.* at 306. The court held that "Plaintiffs' counsel's repeated breach of [the OSI] ruling can only be regarded as deliberate, and considering the inflammatory nature of the references to a multitude of other lawsuits and deaths, we are unable to say as a matter of law that the frequent violation of the trial court's ruling did not influence the jury's verdict." *Id.* at 307.

3. The pervasive misconduct and discovery abuse by Plaintiffs' counsel.

The suggestion that DCC "suppressed" OSIs was only one of many improper and inflammatory arguments made by Plaintiffs' counsel during trial. As shown below, these tactics induced the jury to act with bias, passion, and prejudice rather than carefully evaluating DCC's design choice.²⁴ Finally, Plaintiffs' false statements and concealment of critical crash-test evidence concerning the "dual

²⁴ See, e.g., *Minneapolis, St. Paul & Sault Ste. Marie Ry. v. Moquin*, 283 U.S. 520, 521 (1931) ("no verdict can be permitted to stand which is found to be *in any degree* the result of appeals to passion and prejudice") (emphasis added); *Guess v. Maury*, 726 S.W.2d 906, 913-18 (Tenn. Ct. App. 1986) (surveying cases reversed because of counsel's misconduct, and ordering new trial based, in part, on the "inflammatory and prejudicial" closing argument).

recliner" seat design—which did not come to light until months after the jury rendered its verdict—provided the capstone to a trial that was riddled with error from start to finish.

“Send A Message” Arguments: Over DCC’s objection, *see* 11/23 Tr. 32, 18 R. 3986-87, counsel inflamed the jury with explicit “send a message” arguments, urging the jury to “get the word out” to “all Americans,” and “wake [DCC] up” through a massive punitive damage award that “hits [DCC] where it hurts.”²⁵ Such claims are improper because they pit local jurors against a large, out-of-state corporation, and invite jurors to impose quasi-criminal punishment based on passion and prejudice. *See, e.g., Pullen v. Textron, Inc.*, 845 S.W.2d 777, 779-80 (Tenn. Ct. App. 1992); *Strickland v. Owens Corning*, 142 F.3d 353, 359 (6th Cir. 1998); *Westbrook v. General Tire & Rubber Co.*, 754 F.2d 1233, 1238-39 (5th Cir. 1985).

Punishment For Litigation Strategy: Counsel was also allowed to argue, over DCC’s objection, *see*

²⁵ *See, e.g.,* 11/18 Tr. 66-67 (“The only thing that will stop it is a verdict that hits them where it hurts.”); 11/18 Tr. 92 (“Somebody is going to have to wake them up. Only you can do that.”); 11/18 Tr. 149-50 (“get the message to them” through a substantial punitive damage award); 11/18 Tr. 151 (“[t]he sad truth is the only way to stop this kind of conduct is punitive [damages]. . . . This is a story that needs to get out.”); 11/23 Tr. 194 (“The warning has got to be communicated to everybody for it to be effective to all Americans who own or might ever ride in or put a child in one of these minivans. Since DaimlerChrysler will not warn anybody, it is up to you.”); 11/23 Tr. 210-11 (“We ask that you drop the hammer on them and that you render a verdict that . . . gets the word out.”).

11/23 Tr. 33; 18 R. 3988-91, that the jury should punish DCC for its litigation strategy—including its decision not to call any DCC executives to testify. *See, e.g.*, 11/18 Tr. 92 (“Not a single executive of the DaimlerChrysler Corporation has come before you to explain their conduct Somebody is going to have to wake them up. Only you can do that. We’re going to ask that you vote yes on punitive damages.”).²⁶ Such argument is improper because a defendant cannot be punished for its litigation strategy or in-court tactics, neither of which has any bearing on “the acts upon which liability was premised.” *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422-24 (2003).²⁷

²⁶ *See also* 11/18 Tr. 55-56 (“If you’ve got a product out there and somebody says it is defective and killing and hurting people, and if you’re not willing to bring any of your own employees to court to defend the product, that sort of says it all.”); 11/18 Tr. 92 (“Whether the corporation is willing to answer to you is up to them. Evidence is pretty clear, the answer is no. You have not heard from a single employee of the DaimlerChrysler Corporation.”); 11/18 Tr. 66 (“There is nobody here from DaimlerChrysler to even hear your verdict except lawyers.”); 11/23 Tr. 191; 11/23 Tr. 192; 11/23 Tr. 209.

²⁷ Many courts have held explicitly that “a defendant’s trial tactics and litigation conduct may not be used to impose punitive damages in a tort action.” *See, e.g.*, *De Anza Santa Cruz Mobile Estates Homeowners Ass’n v. De Anza Santa Cruz Mobile Estates*, 94 Cal. App. 4th 890, 918 (2001). *See also* *Sobley v. Southern Natural Gas Co.*, 302 F.3d 325, 341-42 (5th Cir. 2002); *Whitehead v. Food Max of Mississippi, Inc.*, 163 F.3d 265, 276-77 (5th Cir. 1998) (reversible error for plaintiff to argue “Shame on the corporation for not sending representatives here to testify about why they don’t have a policy,” because “[s]uch statements could serve no purpose other than to inflame the passions of the jury to return large

Jurors' Personal Responsibility For Future Deaths: Counsel repeatedly told the jurors, over DCC's objection, *see, e.g.*, 11/23 Tr. 210; 18 Tr. 3991-92, that if they did not impose a substantial punitive damage award, they would be personally responsible for the deaths of children and other individuals. *See, e.g.*, 11/23 Tr. 210 ("You have a chance, ladies and gentlemen, to get done what DaimlerChrysler Corporation has refused to even try to do. And that is to keep children out of the hospitals and out of the morgues."); 11/18 Tr. 66 ("[I]f not you, maybe in the future, there will be an opportunity for some lawyers and clients who have lost somebody to come before another jury and maybe they will do it. If that's the way it gets handled in the future, there will be people dead and injured between today and then.").²⁸

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awards").

²⁸ *See also* 11/18 Tr. 65 ("[DCC] hopes you will do so little that what you do will make no difference and then they will escape. You know the consequences of that; because of some dispute, more are going to die and be injured."); 11/23 Tr. 210 ("When you leave this courtroom after it is all over, you're going to have to ask yourselves, why were you here? And not to put too much of a burden on you, but the burden is immense. For the rest of your lives, you're going to have to ask yourself the question, did I do enough?"); 11/18 Tr. 66 ("The deaths and the injuries will continue until . . . some jury says no more. Put a stop to it."); 11/23 Tr. 192 ("[M]ore will be killed and more will be injured. And we don't know of another instrumentality that has the opportunity to stop it other than you or some day in the future some other jury after somebody else has been killed or badly hurt."); 11/18 Tr. 66 ("[Y]ou can't stop all the deaths and injuries on the roadways. That's true. We all know that is true. But you can, somebody can stop some of them, and the somebody is you."); 11/18 Tr. 85 ("Going after Stockell is not

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This was plainly improper argument. *Cf. Illinois v. Holman*, 469 N.E.2d 119, 133-35 (Ill. App. Ct. 1989) (improper to invoke "virtually guaranteed" deaths of "future innocent victims" because "the likely, if not inevitable, effect of such graphic remarks is to focus the jury's attention on extraneous fears and divert it from considering the [facts of] the case," and because such remarks "ha[ve] no function other than to appeal to the passions and fears of the jury").

"NHTSA Conspiracy": Over DCC's objection, *see* 11/17 Tr. 241-42, 248; 18 R. 3992-95, counsel was permitted to tell the jurors that "NHTSA belongs to the automakers." *See, e.g.*, 11/16 Tr. 89; 11/17 Tr. 25; 11/18 Tr. 79, 135-36, 143-44. Counsel also told the jurors, again and again, that a massive punitive damage award was necessary because "NHTSA is not going to do anything." *E.g.*, 11/18 Tr. 89.²⁹ Such

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going to solve anything. It is not going to stop killing and injuring.").

²⁹ *See also* 11/18 Tr. 79 ("NHTSA has closed the investigation and said we're not going to do anything. What does that mean to you and to this case? It is up to you. Nobody else is going to do anything."); 11/23 Tr. 183 ("[T]he fact that NHTSA has never required a recall of a design defect unless a manufacturer agreed to it is huge. That, too, tells it all. It is up to you."); 11/18 Tr. 134-35 ("[W]hether you like others in the legal profession or not, who is doing anything in this country about automotive safety? Certainly is not the National Highway Traffic Safety Administration."); 11/18 Tr. 78 ("The most important thing to remember about NHTSA is this. What the evidence means is the government is not going to do anything for anybody else."); 11/23 Tr. 38 ("It is undisputed in this case that no safety agency is going to do anything about [the alleged defect].")

argument violates *State Farm*, 538 U.S. at 420, and *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), because it invites the jury to act as a national regulator and displace the judgment of federal safety agencies by projecting Tennessee tort law nationwide. *See also Guess v. Maury*, 726 S.W.2d 906, 916-18 (Tenn. Ct. App. 1986) (vacating jury verdict due to improper allegation of “conspiracy” between defendant and absent third party).

Concealment Of Evidence And False Statements Concerning “Dual Recliners”: At the heart of Plaintiffs’ case was the notion that DCC acted outrageously because it failed to use dual recliners—which are currently used in the RS minivan—in the Sparkmans’ NS minivan. Saczalski testified that dual recliners “would have likely produced a different outcome for Joshua Flax.” *See* 11/9 Tr. 87-88. And Plaintiffs’ counsel repeatedly argued that “the reason they didn’t put [the RS’s] dual recliners in the NS minivan was because of cost. . . . In this 1998 minivan, different seats could have been put in that would not have invaded the occupant compartment.” *See, e.g.*, 11/23 Tr. 184. Plaintiffs’ claim for punitive damages was expressly based on these arguments. *See* 11/23 Tr. 204-05 (“But if it is \$14 minimum more cost to put in dual recliner and you start multiplying it by [seven] million[] minivans, that mounts up pretty quickly.”). *See also* 33 R. 6610 (Plaintiffs’ post-trial brief) (“[DCC] avoided installing a dual recliner that would have doubled the seat strength in the Sparkmans’

minivan because such a move would have entailed adding \$7 to the cost of each of the front seats.”).³⁰

Yet, as Plaintiffs’ own testing showed, these claims and statements were false. In 2002, Plaintiffs paid Saczalski to conduct dynamic rear-impact crash tests on the RS’s dual recliners. These tests—which were conducted under conditions similar to the accident here—resulted in occupant-to-occupant contact between a front-seat passenger and a child seated in the rear seat. However, even though these tests were paid for by Plaintiffs’ counsel, *see* 38 R. 7529, and even though DCC’s discovery request encompassed the crash-test results, *see* 38 R. 7516-19, Plaintiffs never produced these test results during discovery.³¹ Instead, Plaintiffs only produced those tests that they felt resulted in “favorable” results. 38 R. 7549-52.

This misconduct did not come to light until months after trial, when Saczalski was deposed in another NS minivan seat back case pending in

³⁰ Plaintiffs also proffered a different “alternative” seat at trial—known as the “Sebring seat”—but Plaintiffs’ expert conceded that, financially, it would have been “a wash” for DCC to install the Sebring seat in the NS minivan. 11/8 Tr. 235. Thus, Plaintiffs’ punitive damage claim was based on their argument that DCC should have installed dual recliners in the RS minivan, but chose not to in order to save money.

³¹ *See* App. 50-51, 40 R. 7816-17 (trial court’s findings that “these tests were conducted under similar conditions,” that “the dummy in the RS dual recliner seat made contact with the 3-year-old surrogate dummy,” that DCC “made a timely discovery request of the plaintiff for ‘any videos, photos, or tests created or obtained by Plaintiff’s experts,’” and that “Plaintiffs did not disclose [the] sled tests”).

Florida. DCC immediately moved for a new trial, *see* 38 R. 7504-46, and supplied the trial court with a video clip of the long-suppressed crash test that graphically depicted the occupant-to-occupant contact. 40 R. 7773 (index to video). The trial court found that Plaintiffs had “abus[ed] the discovery process” through their concealment and through their misrepresentations and false statements at trial, but refused to order a new trial because it was “of the opinion that discovery of the RS sled tests would not have affected the outcome of the trial.” App. 50-51, 40 R. 7816-17. Instead, the court “sanction[ed] the plaintiffs . . . [by] den[y]ing any and all discretionary costs.” *Id.*

The trial court erred by not imposing a more severe sanction. It was Plaintiffs’ misconduct that enabled them to obtain the \$101.75 million verdict, as their entire argument for punitive damages would have been exposed as a fraud had they produced the crash-test results or simply refrained from making arguments that their own tests proved to be false. The sanction imposed by the court—the loss of discretionary costs totaling a few thousand dollars—is hardly commensurate with the multi-million dollar verdict that the misconduct helped produce. At a minimum, this episode provides an additional reason for this Court to conclude that, based on the totality of the evidentiary errors and misconduct discussed above, the verdict cannot stand.

B. A New Trial On Punitive Damages Is Required.

Plaintiffs’ punitive damage claim should never have been submitted to the jury, and the Court should grant judgment in DCC’s favor on this claim. In the alternative, the Court should vacate the

award and order a new trial because the verdict is against the weight of the evidence for the reasons discussed above, and because the jury's determination of punitive damages was tainted by numerous errors that violated DCC's due process rights.

* * *

IV. AT A MINIMUM, THIS COURT SHOULD REMIT THE DAMAGE AWARDS.

* * *

B. The Punitive Damage Award Is Excessive And Unconstitutional.

The Court should also enter a significant remittitur of, or eliminate altogether, the \$20 punitive damage award, which is unconstitutionally excessive under the due process standards that govern and limit such awards.⁴² In *BMW of N. Am.*,

⁴² DCC requested that the trial court remit the punitive damage award to no more than the size of the compensatory damage award against DCC. 18 R. 3995-4000.

Inc. v. Gore, 517 U.S. 559 (1996), the Supreme Court held that the Due Process Clause forbids “grossly excessive” punitive damage awards, and required excessiveness challenges to be evaluated by reference to three “guideposts”—reprehensibility, ratio, and comparable penalties—to determine whether the defendant had “fair notice” of the severity of the punishment that could be imposed. *Id.* at 574-85. In *State Farm*, the Court strengthened the *Gore* guideposts, emphasizing again the Court’s deep concerns about the continuing dangers of “grossly excessive” and “arbitrary” punitive damage verdicts, particularly those imposed pursuant to vague standards and procedures. 538 U.S. at 417-18. The Court observed that, although punitive damage awards serve the same purposes as criminal penalties, defendants subjected to punitive damages “have not been accorded the protections applicable in a criminal proceeding. This increases our concerns over the imprecise manner in which punitive damage systems are administered.” *Id.* at 417. To protect against arbitrary and unconstitutional awards, it is therefore vital that “[t]he principles set forth in *Gore* . . . be implemented with care, to ensure both reasonableness and proportionality.” *Id.* at 428.

The Court also emphasized that the constitutionally-mandated *de novo* review of a punitive damage award must be “exacting.” 538 U.S. at 418 (brackets omitted); see also *In re Exxon Valdez*, 270 F.3d 1215, 1239 (9th Cir. 2001) (“a hands-off appellate deference to juries, typical of other kinds of cases and issues, is unconstitutional for punitive damages awards”).

Ratio: *State Farm* establishes that the ratio of punitive to compensatory damages in this case—still over 5:1 after the remittitur—is unconstitutional. The Court squarely held that where “compensatory damages are substantial, then a lesser ratio, *perhaps only equal to compensatory damages*, can reach the outermost limit of the due process guarantee.” 538 U. S. at 425 (emphasis added).

Because the compensatory award in this case was undeniably “substantial”—and indeed far higher than the \$1 million compensatory award in *State Farm*—a 1:1 ratio is the maximum the Constitution permits. *Cf. Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 603 (8th Cir. 2005) (although defendant’s conduct was “highly reprehensible,” a 1:1 ratio is the constitutional maximum where compensatory damages are \$4 million); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 798-99 (8th Cir. 2004) (holding that a punitive damage award resulting in a 10-to-1 ratio was constitutionally excessive, and reducing the award by 90% to achieve a 1-to-1 ratio).

Moreover, in *State Farm*, the Court recognized that a lower ratio is appropriate where the compensatory damages “likely were based on a component which was duplicated in the punitive award,” such as pain and suffering or emotional distress damages. 538 U.S. at 426. Here, Rachel Sparkman was awarded \$1,250,000 million for negligent infliction of emotional distress against DCC—and then an additional \$6,632,655 in punitive damages based solely on that claim. Likewise, most of the wrongful death compensatory award was

based on Joshua Flax's pain and suffering rather than on lost wages. *See Part IV.A supra.* The duplication inherent in these awards warrants a further reduction.

Comparable Penalties: *State Farm* requires courts to evaluate the excessiveness of punitive damage awards by reference to the awards "imposed in comparable cases." 538 U.S. at 428 (quoting *Gore*, 517 U.S. at 575). Even after the trial court's remittitur, the \$20 million award in this case is larger than the *combined total* of *all* prior punitive damage awards that have survived appeal in reported cases in Tennessee state courts.⁴³ The award is 10 times greater than the highest individual award ever to have survived appeal. *See Galde v. Keriisis*, 1999 WL 496630 (Tenn. Ct. App. July 15, 1999) (affirming \$2 million award).⁴⁴

⁴³ DCC submitted with its post-trial motion a chart summarizing all prior punitive damage awards upheld in Tennessee, the accuracy of which Plaintiffs did not challenge. App. 23-32, 18 R. 4021-30.

⁴⁴ The evidence and argument concerning DCC's "wealth"—which was presented over DCC's objection, *see* 11/17 Tr. 213-16; 11/23 Tr. 10, 42, 57-60, 187; 15 R. 3613 (proposed Phase I jury instruction); 17 R. 3799 (proposed Phase II jury instruction); 18 R. 3981-84 (post-trial motion)—does not provide any basis for departing from the *Gore/State Farm* due process guideposts. Indeed, in *State Farm*, the Court expressly noted that a defendant's wealth "bear[s] no relation to the award's reasonableness or proportionality to the harm" and simply "provides an open-ended basis for inflating awards when the defendant is wealthy." 538 U.S. at 427-28 (quotation omitted). Moreover, the admission of evidence of the purported wealth of DaimlerChrysler AG—again over DCC's objection, *see* 16 R. 3752, 18 R. 3983—is an additional due process violation.

The *State Farm* Court also looked to “[t]he most relevant civil sanction under . . . state law for the wrong done to the [plaintiffs],” and determined that the relevant sanction—a \$10,000 fine for an act of fraud—was “dwarfed by the . . . punitive damages award.” 538 U.S. at 428. The Court noted that it “need not dwell long on this guidepost” because it was so clear that the amount of the punishment vastly exceeded any comparable sanction. *Id.* Here too, the relevant sanctions are dwarfed by the punitive damage award. At the time of the Caravan’s design and manufacture in 1998, the maximum civil penalty that could be imposed by NHTSA for a design defect was \$1,000 per vehicle, up to a maximum of \$800,000 for an entire fleet of defective vehicles. *See* 49 U.S.C. § 30165(a) (1998).

Criminal fines also provide guidance. Under Tennessee law, a corporation generally may be fined no more than \$350,000 for commission of a felony. *See* Tenn. Code. Ann. § 40-35-111(c). Here, of course, DCC committed no crime, nor was it charged with a crime, and the Court in *State Farm* stated that “[g]reat care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof.” 538 U.S. 428. Yet the \$20 million penalty here is more than 57 times the size of the maximum fine that could have been imposed against DCC had it actually been

[Footnote continued from previous page]

DaimlerChrysler AG is a separate and independent German corporation only indirectly related to DCC. *See* 27 R. 5654-55.

charged, tried, and convicted of a felony in Tennessee and afforded all the protections of a criminal trial.⁴⁵

* * *

DATED: December 5, 2005

Respectfully submitted,

/s/

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⁴⁵ The punitive damage award is also excessive under the state-law standards established in *Hodges*. As discussed above, many of the *Hodges* factors cut strongly in DCC's favor and require that the award be reduced. Because many of the *Hodges* factors are relevant to the question whether *any* punitive damages may be awarded (as well as to the excessiveness of the award under federal due process standards), they are addressed in the discussion above, and DCC hereby incorporates all of its foregoing arguments.

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APPENDIX H

IN THE CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

**JEREMY FLAX and RACHEL SPARKMAN, as the
Natural Parents of Joshua Flax, deceased; RACHEL
SPARKMAN, individually, Plaintiffs,**

v.

**DAIMLERCHRYSLER CORPORATION, and LOUIS
A. STOCKELL, JR., Defendants.**

NO. 02C-1288

DAIMLERCHRYSLER CORPORATION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND NEW TRIAL

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* * *

**IV. AT A MINIMUM, THIS COURT SHOULD
ORDER A NEW TRIAL ON PUNITIVE
DAMAGES OR ENTER A DRASTIC
REMITTITUR.**

**A. DCC Is Entitled To A New Trial On Punitive
Damages.**

* * *

**4. The Arguments, Evidence And Instructions
Concerning Punitive Damages Violated *State
Farm*.**

The Phase 2 proceeding violated, in numerous ways, the constitutional limitations on punitive damage awards established in *State Farm Mutual*

Automobile Insurance Co. v. Campbell, 538 U.S. 408 (2003).

First, the Court erred by admitting evidence of the “wealth” and financial condition of DaimlerChrysler AG, and by instructing the jury that the punitive damage award “must” be based upon it. *See* 11/17 Tr. 217-19 (overruling DCC’s objection), 11/23 Tr. 34 (instruction). In *State Farm*, the Court disapproved the use of wealth as a basis for punitive damage awards, explaining that wealth “bear[s] no relation to the award’s reasonableness or proportionality to the harm” and simply “provides an open-ended basis for inflating awards when the defendant is wealthy.” 538 U.S. at 427-28 (quotation omitted). “The fact that [a defendant] is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business. Indeed, its status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce.” *Id.* at 427 (quotation omitted); *see also* *BMW v. Gore*, 517 U.S. 559, 585 (1996) (rejecting wealth as a due process factor); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 464 (1993) (“emphasis on the wealth of the wrongdoer increase[s] the risk that the award may have been influenced by prejudice against large corporations”); American Law Institute, *Enterprise Responsibility for Personal Injury: Reporter’s Study* 255 (1991) (reliance on corporate defendant’s wealth “cannot be justified even by the rationale of economic deterrence, let alone retributive punishment.”).

Here, Plaintiffs were permitted to introduce evidence of DCC's wealth and financial condition. 11/23 Tr. 55-60. The jury was instructed that it "must" base the award on wealth. 11/23 Tr. 34 (instruction). And in closing argument, Plaintiffs' counsel repeatedly hammered the theme that a substantial punitive damage award was necessary to "send a message" to a "wealthy" corporation. *See, e.g.*, 11/23 Tr. 41 (arguing that the alleged net worth of DaimlerChrysler AG is "the primary evidence" relevant to punitive damages and contending that "DaimlerChrysler AG has a net worth of shareholders equity of \$42 billion" and Chrysler Group "in the first nine months of this year had an operating profit of \$1.2 billion"); *id.* at 187 (arguing that "defendant's net worth and financial condition" is important factor). Even if the use of wealth evidence is permissible under Tennessee law, it is forbidden as a matter of federal constitutional law.¹⁶

¹⁶ The admission of the financial data violated DCC's due process and Sixth Amendment right to confront witnesses, in that DCC had no witness to question and cross-examine.

The fact that the award was based on the purported wealth of DaimlerChrysler AG is an additional due process violation. DaimlerChrysler AG is a separate and independent German corporation only indirectly related to DCC.¹⁷ DaimlerChrysler AG is not a party to this lawsuit and the information in its financial statement includes revenues of many affiliated corporations other than DCC. The wealth of this corporation is irrelevant and should not have been allowed to furnish the basis for the punitive damage award.

Second, Plaintiffs were improperly permitted to introduce evidence and make arguments concerning extraterritorial conduct by DCC in support of a large punitive damage award. In *State Farm*, the Court emphasized that the Due Process and Commerce Clauses impose *territorial* limitations on punitive damage awards. "A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction." *Id.* at 422. Thus a jury "may not use

¹⁷ DCC (a Delaware corporation that was formerly known as Chrysler Corporation) is a subsidiary of DaimlerChrysler Motors Company, L.L.C. (a Delaware limited liability company), which is, in turn, a subsidiary of DaimlerChrysler North America Holding Corporation (also a Delaware corporation), which is owned by DaimlerChrysler AG (an Aktiengesellschaft, or German public stock corporation). Thus, DCC has only an indirect relationship with DaimlerChrysler AG, and the two companies are separate, independent and distinct legal entities.

evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." *Id.* "Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside the State's jurisdiction." *Id.* at 421. *Accord Lien v. Couch*, 993 S.W.2d 53, 57 (Tenn. Ct. App. 1998) ("Tennessee cannot demand that its laws be given extraterritorial effect") (citing *Gore*).

These limitations were repeatedly violated in this case. As discussed above, Plaintiffs introduced large quantities of evidence and testimony concerning alleged incidents that occurred in other States or even other countries. *See Part I(b) supra*; PX976 (McCloskey—Ottawa, Canada). Plaintiffs also introduced evidence concerning the revenues of DaimlerChrysler AG, which reflect the profits from the company's *worldwide* sales and business activities. 11/23 Tr. 54-59. And Plaintiffs urged the jury to displace NHTSA and impose a punishment that was nationwide in scope and would vindicate the rights of "all Americans." 11/23 Tr. 191. This evidence and argument demonstrates that the punitive damage award in this case was based on DCC's conduct throughout the United States and the world, not just within the State of Tennessee, in violation of the Due Process Clause and the Commerce Clause of the United States Constitution.

The extraterritorial nature of the punishment is evident in the fact that the jury apparently calculated the punitive damage award of \$98 million based on the amount of money per vehicle DCC purportedly "saved" by not adopting Plaintiffs' preferred design, multiplied by the number of similar

vehicles sold nationally over a span of 20 years. *See* 11/23 Tr. 204-05 (Plaintiffs' Phase II closing argument) ("They say there were 7 million minivans altogether. But if it is \$14 minimum more cost to put in dual recliner[s] and you start multiplying it by millions of minivans, that mounts up pretty quickly."). Even assuming that punitive damages could be imposed on this basis (they cannot), the proper "baseline" would have been the number of similar vehicles sold in Tennessee.

Third, the Court erred by rejecting DCC's proposed jury instruction that any decision to impose punitive damages must be based solely on harm to the Plaintiffs. 11/17 Tr. 213. In its reprehensibility discussion, the *State Farm* Court held that a punitive damage award may not be based on evidence and arguments concerning alleged harm to third-party individuals not before the Court. Rather, a punitive damage award must be strictly limited to punishing the defendant for the harm caused to the plaintiff in the case at bar: "Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis." 538 U.S. at 423.

In closing argument, Plaintiffs' counsel urged the jury to impose a large punitive sanction based on the alleged harm to individuals other than the Plaintiffs. *See, e.g.*, 11/23 Tr. 39 ("the line of victims that [recedes] 20 years into the past . . . continues on into the future."); *id.* at 190 ("most of the victims you've heard about . . . who were killed and injured were in NS vehicles"). This by itself was error, and violated *State Farm*. But at a minimum, DCC was entitled to an instruction informing the jury that

punitive damages could not be imposed to vindicate the rights of these other individuals, but must be strictly limited to the harm suffered by Plaintiffs.

5. The Jury Was Inflamed By The Improper Arguments Of Plaintiffs' Counsel And Acted From Passion And Prejudice.

This Court should order a new trial because the \$98 million punitive damage award is so excessive and irrational as to indicate that the jury acted with bias, passion, and prejudice. *See, e.g., Minneapolis, St. Paul & Sault Ste. Marie Ry. v. Moquin*, 283 U.S. 520, 521 (1931) ("no verdict can be permitted to stand which is found to be *in any degree* the result of appeals to passion and prejudice") (emphasis added). That the verdict was tainted by passion and prejudice is hardly surprising in light of Plaintiffs' counsel's many improper appeals to the jury, the large quantities of irrelevant and highly prejudicial evidence discussed above, and the Court's refusal to permit DCC to show the jury why it chose the design it did. From beginning to end, Plaintiffs' counsel inflamed and prejudiced the jury with clearly improper arguments and exhortations. These tactics produced the tainted and unsupportable verdict. *See Guess v. Maury*, 726 S.W.2d 906, 913-18 (Tenn. Ct. App. 1986) (surveying cases reversed because of counsel's misconduct, and ordering new trial because of "inflammatory and prejudicial" closing argument).

a. "Send a message" arguments

Over DCC's objection, Plaintiffs' counsel inflamed the jury with explicit "send a message" arguments, urging the jury to "get the word out" to "all Americans," and "wake [DCC] up" through a massive punitive damage award that "hits [DCC] where it hurts."

These arguments pervaded Plaintiffs' closing arguments in both Phase 1 and 2. See, e.g., 11/18 Tr. 66-67 ("The only thing that will stop it is a verdict that hits them where it hurts."); 11/18 Tr. 92 ("Somebody is going to have to wake them up. Only you can do that. We're going to ask that you vote yes on punitive damages."); 11/18 Tr. 149-50 ("get the message to them" through a substantial punitive damage award); 11/18 Tr. 151 ("[t]he sad truth is the only way to stop this kind of conduct is punitive [damages]. . . . This is a story that needs to get out."); 11/23 Tr. 194 ("The warning has got to be communicated to everybody for it to be effective to all Americans who own or might ever ride in or put a child in one of these minivans. Since DaimlerChrysler will not warn anybody, it is up to you."); 11/23 Tr. 192 ("it is important that you return a verdict that will get the word out"); 11/23 Tr. 208 ("We ask that you drop the hammer on them and that you render a verdict that . . . gets the word out.").

Urging a jury to impose punitive damages in order to "send a message" or "get the word out" is highly improper. Such exhortations are inherently prejudicial because they pit local jurors against a large, out-of-state corporation, and invite jurors to impose quasi-criminal punishment based on passion and prejudice. See, e.g., *Pullen v. Textron, Inc.*, 845 S.W.2d 777, 779-80 (Tenn. Ct. App. 1992) (vacating punitive damage award because "[t]he jury was told to 'send a message to [the defendant] with punitive damages' and was asked to 'make the fine large enough that it hurts'"); *Strickland v. Owens Corning*, 142 F.3d 353, 359 (6th Cir. 1998) ("It is true that an 'us-against-them' plea can have no appeal other than prejudice by pitting 'the community' against a

nonresident corporation [and] is an improper distraction from the jury's sworn duty to reach a fair, honest and just verdict."") (citation omitted); *Westbrook v. General Tire & Rubber Co.*, 754 F.2d 1233, 1238-39 (5th Cir. 1985) ("Our condemnation of a 'community conscience' argument is not limited to the use of those specific words; it extends to all impassioned and prejudicial pleas intended to evoke a sense of community loyalty, duty and expectation. Such appeals serve no proper purpose and carry the potential of substantial injustice when invoked against outsiders.").

Such exhortations—notably the invitation to send a message to "all Americans"—also violate *State Farm*'s prohibition on extraterritorial punishment. *See, e.g., White v. Ford Motor Co.*, 312 F.3d 998, 1015 (9th Cir. 2002) (reversing punitive damages award because "Plaintiffs' attorney repeated . . . his 'send them a message' argument. . . . The entire thrust of the argument was that this Nevada jury now should vindicate the interests of all Ford truck owners everywhere with a verdict that would make the front page of every newspaper in the country. . . . With this evidence and argument, . . . we cannot conclude . . . [that] the jury plainly was vindicating only [Nevada's] interest in protecting its citizens or that it was addressing Ford's reprehensibility only in the case at bar."); *Romo v. Ford Motor Co.*, 113 Cal. App. 4th 738, 754 (2003) (plaintiff's argument that jury should return verdict that would get "publicity" is "impermissible under *State Farm*").

b. Litigation strategy and "absent" corporate representatives

In *State Farm*, the Supreme Court held that a jury's decision to impose punitive damages must

remain tightly focused on the underlying tort, and may not be based on “acts . . . independent from the acts upon which liability was premised.” 538 U.S. at 422-23 (“[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business”). In other words, “the conduct that harmed [the plaintiffs] is the only conduct relevant” to a punitive damages determination. *Id.* at 424 (emphasis added).

Thus, punitive damages may not be based on a defendant’s litigation strategy or in-court tactics, neither of which has any bearing on “the acts upon which liability was premised.” Many courts have held explicitly that “a defendant’s trial tactics and litigation conduct may not be used to impose punitive damages in a tort action.” *De Anza Santa Cruz Mobile Estates Homeowners Ass’n v. De Anza Santa Cruz Mobile Estates*, 94 Cal. App. 4th 890, 918 (2001). See also *Sobley v. Southern Natural Gas Co.*, 302 F.3d 325, 341-42 (5th Cir. 2002) (a defendant’s “litigation positions and tactics . . . do[] not constitute the kind of malice, willfully wrongful conduct, gross negligence, or reckless disregard . . . for which punitive damages are properly imposed”); *Sanford v. Ektelon/Prince Sports Group, Inc.*, 1999 WL 33544436, at *4 (D. Neb. Nov. 5, 1999) (rejecting argument that “the defendants’ litigation conduct is relevant to the punitive damages requested in this case,” and explaining that such conduct “is not relevant, would be prejudicial, would take the jury away from the case, and will not be admissible”); *Palmer v. Ted Stevens Honda*, 193 Cal. App. 3d 530, 540 (1987) (“Not only was the admission of this

evidence of defendant's litigation conduct . . . error, we conclude it undermines the integrity of the punitive damage award.").¹⁸

Over DCC's objection, 11/23 Tr. 32, Plaintiffs' counsel made DCC's litigation strategy—including its decision not to call any DCC executives to testify—a key element of their punitive damage claim:

- "Remember this. Not a single executive of the DaimlerChrysler Corporation has come before you to explain their conduct, to express regret, promise to do anything or to promise to tell the public the truth about what is happening. Nobody. Somebody is going to have to wake them up. Only you can do that. We're going to ask that you vote yes on punitive damages." 11/18 Tr. 92.
- "If you've got a product out there and somebody says it is defective and killing and hurting people, and if you're not willing to bring any of your own employees to court to defend the product, that sort of says it all." 11/18 Tr. 55-56.
- "Whether the corporation is willing to answer to you is up to them. Evidence is pretty clear, the answer is no. You have not heard from a single employee of the DaimlerChrysler Corporation." 11/18 Tr. 92.

¹⁸ Basing punitive damages on litigation conduct also runs afoul of the First Amendment's protection of free speech and the right to petition government. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (restrictions on the types of arguments attorneys may make in court "implicate[] central First Amendment concerns").

- “There is nobody here from DaimlerChrysler to even hear your verdict except lawyers.” 11/18 Tr. 66.

This improper and inflammatory argument continued during Phase 2, when Plaintiffs’ counsel urged the jury to “drop the hammer” on DCC, through a massive punitive damages award, because of DCC’s “whole attitude” during trial (*i.e.*, refusing to admit its product was defective), and because no DCC executive had traveled to Tennessee to apologize to the jury:

- “Any other circumstances shown by the evidence that bears on determining the proper amount of the punitive award. We respectfully submit that DaimlerChrysler’s whole attitude has to be considered, the attitude that you saw before your verdict last week and even more particular the attitude that you’ve seen since that verdict.” 11/23 Tr. 189.
- “[A]fter you have delivered the verdict you did yesterday, they come in and say you’re wrong, we still say there is nothing wrong with our seats and we’re not going to do anything about it, what do you have to do to get their attention?” 11/23 Tr. 184.
- “[A]t a time when a jury of citizens has determined that this product is defective, unreasonably dangerous, and caused the death of Joshua Flax, one would think it reasonable to expect the corporation to come in here and at least say something to convince you that you should not drop the hammer on them. What do we get from DaimlerChrysler? No remorse, no regret, no apology, no admission of anything, no promise to warn and fix.” 11/23 Tr. 190.

- “Ms. Burns said that 7 and a half million dollars was punishment enough. Well, there is [a] problem[] with that. . . . [I]f that verdict of yesterday was enough, how do you explain their reaction today?” 11/23 Tr. 209.

Numerous courts have squarely held that *this exact argument* is improper and constitutes reversible error. For example, in *Whitehead v. Food Max of Mississippi, Inc.*, 163 F.3d 265, 276-77 (5th Cir. 1998), plaintiffs’ counsel argued: “why didn’t we see someone from the national company come into this courtroom and try to explain their conduct?” and “Shame on the corporation for not sending representatives here to testify about why they don’t have a policy.” The court deemed this reversible error, holding that “[s]uch statements could serve no purpose other than to inflame the passions of the jury to return large awards.” *Id.* See also *Pingatore v. Montgomery Ward & Co.*, 419 F.2d 1138, 1142 (6th Cir. 1969) (“[P]laintiffs’ counsel in his closing argument to the jury . . . [r]efer[red] to Ward as a corporation and a large organization and plac[ed] a chair facing the jury and shout[ed] ‘Where is the corporation today?’”—this conduct “was calculated to prejudice the minds of the jury against Ward.”). Here too, Plaintiffs’ argument had no purpose other than to inflame and prejudice the jury.

c. Telling jurors they would be personally responsible for future deaths

Plaintiffs’ counsel repeatedly told the jurors that if they did not impose a substantial punitive damage award, they would be personally responsible for the deaths of children and other individuals. Counsel represented to the jurors that they bore the “immense” “burden” of “keep[ing] children out of the

hospitals and out of the morgues," and warning them that if they chose not to impose punitive damages, "there will be people dead and injured between today and then":

- "You have a chance, ladies and gentlemen, to get done what DaimlerChrysler Corporation has refused to even try to do. And that is to keep children out of the hospitals and out of the morgues." 11/23 Tr. 210.
- "[DCC] hopes you will do so little that what you do will make no difference and then they will escape. You know the consequences of that; because of some dispute, more are going to die and be injured." 11/18 Tr. 65.
- "When you leave this courtroom after it is all over, you're going to have to ask yourselves, why were you here? And not to put too much of a burden on you, but the burden is immense. For the rest of your lives, you're going to have to ask yourself the question, did I do enough?" 11/23 Tr. 207.
- "The deaths and the injuries will continue until . . . some jury says no more. Put a stop to it." 11/18 Tr. 66.
- "[I]f not you, maybe in the future, there will be an opportunity for some lawyers and clients who have lost somebody to come before another jury and maybe they will do it. If that's the way it gets handled in the future, there will be people dead and injured between today and then." 11/18 Tr. 66.
- "[M]ore will be killed and more will be injured. And we don't know of another instrumentality that has the opportunity to stop it other than you or some day in the future some other jury after somebody else has been killed or badly hurt." 11/23 Tr. 192.

- “[Y]ou can’t stop all the deaths and injuries on the roadways. That’s true. We all know that is true. But you can, somebody can stop some of them, and the somebody is you.” 11/18 Tr. 66.
- “Going after Stockell is not going to solve anything. It is not going to stop killing and injuring.” 11/18 Tr. 85.

This highly inflammatory and manifestly improper argument tainted the verdict, prejudiced DCC, and requires a new trial.

d. Urging jurors to overrule a corrupt and ineffective NHTSA

The bookend to the preceding theme—that jurors would be personally responsible for the future deaths of children—was that the National Highway Traffic Safety Authority was corrupt and controlled by the automakers, and that it was up to the jury to regulate automobile safety in America.

- “The point is, NHTSA has closed the investigation and said we’re not going to do anything. What does that mean to you and to this case. It is up to you. Nobody else is going to do anything.” 11/18 Tr. 77.
- “NHTSA is not going to do anything. Maybe you can help make it happen.” 11/18 Tr. 89.
- “[T]he fact that NHTSA has never required a recall of a design defect unless a manufacturer agreed to it is huge. That, too, tells it all. It is up to you.” 11/23 Tr. 183.
- “[W]hether you like others in the legal profession or not, who is doing anything in this country about automotive safety? Certainly is not

the National Highway Traffic Safety Administration." 11/18 Tr. 134-35.

- "The most important thing to remember about NHTSA is this. What the evidence means is the government is not going to do anything for anybody else." 11/18 Tr. 78.
- "It is undisputed in this case that no safety agency is going to do anything about [the alleged defect]." 11/23 Tr. 38.
- "NHTSA belongs to the automakers, which is why two days ago we got that announcement." 11/18 Tr. 143.

This argument was improper for many reasons, including the fact that (as with the arguments discussed above) it was prejudicial and inflammatory. See 11/17 Tr. 241-43; *Guess*, 726 S.W.2d at 916-18 (vacating jury verdict because of improper argument by plaintiffs' counsel alleging a "conspiracy" between the defendant and an absent third party).

Moreover, Plaintiffs' argument violated *State Farm*'s limits on the permissible considerations that may underlie a punitive damage award. In *State Farm*, the Court condemned the plaintiffs' effort to persuade the jury to act as a national insurance regulator by imposing a large punitive damage award. The Court specifically noted that counsel had argued to the jury that "[y]ou're going to hear evidence that even the insurance commission in Utah and around the country are unwilling or inept at protecting people against abuses," and that "you, here, are going to be evaluating and assessing, and hopefully requiring [the defendant] to stand accountable for what it's doing across the country,

which is the purpose of punitive damages." 538 U.S. at 420. Here, just as in *State Farm*, counsel urged the jury to act as a national regulator, exhorting the jury to overrule NHTSA's purported failure to adequately regulate seatback strength, and urging the jury to impose a significant punitive damage award as a way of getting the attention of a large corporate defendant and triggering a nationwide policy change. *Accord Lien v. Couch*, 993 S.W.2d 53, 57 (Tenn. Ct. App. 1998) ("Tennessee cannot demand that its laws be given extraterritorial effect") (citing *Gore*).

This type of argument also frustrates and interferes with NHTSA's congressional mandate to regulate motor vehicle safety. See, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000) (common law tort claim preempted under Safety Act where permitting jury to impose liability would conflict with NHTSA's decision balancing numerous factors); *id.* at 871 (recognizing that "the rules of law that judges and juries create or apply in such suits may themselves similarly create uncertainty and even conflict, say, when different juries in different States reach different decisions on similar facts"). It is also improper under *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001), which preempts claims of "fraud on the agency." Of course, Plaintiffs' claim of agency *corruption* is far more intrusive than the claim (preempted by *Buckman*) that a third party has victimized an agency through fraud.

* * *

b. Ratios of 26:1 are plainly unconstitutional.

State Farm establishes that the ratios of punitive to compensatory damages in this case are unconstitutional. With regard to the wrongful death claim, the punitive award of \$65,500,000 is just over 26 times the compensatory award of \$2,500,000. With regard to the NIED claim, the punitive award of \$32,500,000 is exactly 26 times the compensatory award of \$1,250,000.

In *State Farm*, the Court held that “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” 538 U.S. at 425. The Court further recognized that in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 23-24 (1991), it had concluded “that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety.” 538 U.S. at 425. The Court also emphasized that it had “cited that 4-to-1 ratio again in *Gore*,” and “further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish.” *Id.* (citing *Gore*, 517 U.S. at 581). Finally, the Court held that where “compensatory damages are substantial, then a lesser ratio, *perhaps only equal to compensatory damages*, can reach the outermost limit of the due process guarantee.” 538 U.S. at 425 (emphasis added).

Because the total compensatory award in this case was undeniably “substantial”—and indeed far higher than the \$1 million compensatory award in *State Farm*—a 1:1 ratio is the maximum the

Constitution permits. *Cf. Pollard v. E.I. DuPont de Nemours, Inc.*, 2003 WL 23849733, at *5 (W.D. Tenn. Oct. 22, 2003) (although defendant's conduct was "reprehensible," "completely unacceptable" and "outrageous," a 2:1 ratio was the constitutional maximum permissible under *State Farm* in light of "the substantial compensatory damages" of \$1.25 million); *Boerner v. Brown & Williamson Tobacco Co.*, 2005 WL 30394, at *6-7 (8th Cir. Jan. 7, 2005) (although defendant's conduct was "highly reprehensible," a 1:1 ratio is the constitutional maximum where compensatory damages are \$4 million).

Moreover, in *State Farm*, the Court recognized that a lower ratio is appropriate where the compensatory damages "likely were based on a component which was duplicated in the punitive award," such as pain and suffering or emotional distress damages. 538 U.S. at 426. Here, Rachel Sparkman was awarded \$1.25 million for negligent infliction of emotional distress—and then an additional \$6,632,653 in punitive damages based solely on that claim. Likewise, most of the wrongful death compensatory award was based on Joshua Flax's pain and suffering rather than on lost wages. The duplication inherent in these awards warrants a further reduction.

c. The award vastly exceeds any comparable penalties.

State Farm requires courts to evaluate the excessiveness of punitive damage awards by reference to the awards "imposed in comparable cases." 538 U.S. at 428 (quoting *Gore*, 517 U.S. at 575). The \$98 million award in this case is more than 8 times the combined total of all prior punitive

damage awards that have survived appeal in reported cases in Tennessee state courts. The award is almost 50 times greater than the highest individual award ever to have survived appeal. *See Galde v. Keritsis*, 1999 WL 496630 (Tenn. Ct. App. July 15, 1999) (affirming \$2 million award). A chart summarizing these awards is attached hereto at Tab 5.

The *State Farm* Court also looked to “[t]he most relevant civil sanction under . . . state law for the wrong done to the [plaintiffs],” and determined that the relevant sanction—a \$10,000 fine for an act of fraud—was “dwarfed by the . . . punitive damages award.” 538 U.S. at 428. The Court noted that it “need not dwell long on this guidepost” because it was so clear that the amount of the punishment vastly exceeded any comparable sanction. *Id.*

Here too, the relevant sanctions are dwarfed by the punitive damage award. At the time of the Caravan’s design and manufacture in 1998, the maximum civil penalty that could be imposed by NHTSA for a design defect was \$1,000 per vehicle, up to a maximum of \$800,000 for an entire fleet of defective vehicles. *See* 49 U.S.C. § 30165(a) (1998).

Criminal fines also provide guidance. Under Tennessee law, a corporation generally may be fined no more than \$350,000 for commission of a felony. *See* Tenn. Code. Ann. § 40-35-111(c). Here, of course, DCC committed no crime, nor was it charged with a crime, and the Court in *State Farm* stated that “[g]reat care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof.” 538 U.S. 428.

Yet the \$98 million penalty here is 280 times the size of the maximum fine that could have been imposed against DCC had it actually been charged, tried and convicted of a felony in Tennessee and afforded all the protections of a criminal trial.

* * *

Dated: January 20, 2005.

Respectfully submitted,

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,

Petitioner,

v.

JEREMY FLAX, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Tennessee

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

This appeal began with a \$105.5 million judgment. Through careful application of this Court's precedents, the trial judge and the Tennessee Supreme Court reduced that award to \$5 million in compensatory damages for wrongful death (only \$2.5 million against Petitioner) and \$13 million in punitive damages. In their *de novo* reviews, the trial court and the Tennessee Supreme Court held that "clear and convincing" evidence left "no serious or substantial doubt" Petitioner knew "the danger its seats [in this family minivan] posed to the public," and to child passengers in particular; "conscious[ly] disregard[ed] . . . the safety of others"; and "deceitfully covered up evidence of the deficiencies of its seat design" that killed Respondents' 8-month-old child. Pet. App. 25a-26a, 32a-33a. Such "reckless" and "reprehensible" misconduct, the Tennessee Supreme Court held, clearly supported the punitive damages award as already remitted under this Court's precedents. *Id.* at 26a, 31a, 36a.

The Questions Presented, properly related, are

1. Whether Petitioner may claim lack of "fair notice" of its potential punitive-damage liability when Petitioner engaged in a "long term pattern" of "reprehensible" misconduct, including having "knowledge of the dangers its seats posed to the public for years" and "deceitfully cover[ing] up evidence of the

**COUNTERSTATEMENT OF
QUESTIONS PRESENTED – Continued**

deficiencies of its seat design while simultaneously advertising the Caravan as a vehicle that put children's safety first." *Id.* at 32a-33a.

2. Whether, following faithful and meticulous application below of this Court's relevant precedents and remittance of the award, this Court should review the constitutionality of an unremarkable punitive damage award that is both reasonable and proportionate to the fatal injuries sustained by an 8-month-old child, where the asserted errors consist of no more than insubstantial claims of erroneous factual findings or of misapplication of a properly stated rule of law.

3. Whether this Court should assert jurisdiction, even for purposes of a now-mooted GVR request, to force the court below to "reconsider" a question when the issue was not "considered" below because Petitioner waived it under longstanding Tennessee law.

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents Jeremy Flax and Rachel Sparkman, as the natural parents of Joshua Flax, deceased (“Respondents” or “Plaintiffs”), respectfully submit this brief in opposition to the petition for a writ of certiorari.

JURISDICTION

As discussed more fully in the reasons for denying the writ (*see infra* pp. 26-30), this Court lacks jurisdiction under 28 U.S.C. § 1257(a) as to Question 3 because the federal question Petitioner raises was not presented to the intermediate appellate court, and the Tennessee Supreme Court, in accordance with established practice, refused to consider the issue.

COUNTERSTATEMENT OF THE CASE

The Petition provides a woefully incomplete account of both the procedural history of this case and the record evidence. On June 30, 2001, Joshua Flax was properly positioned and secured in his forward-facing car seat, directly behind the right front seat of his grandparents’ 1998 Dodge Grand Caravan, when the Caravan was rear-ended by defendant Louis Stockell’s pick-up truck. Pet. App. 4a-5a. The collision was not severe enough to cause significant injury to any of the five other occupants of the minivan or the

driver of the pickup truck. *Id.* It was sufficient, however, to cause the defective right front seat to collapse rearward, causing the head of its belted occupant to strike Joshua's forehead. *Id.* at 5a. The impact fractured Joshua's skull, producing a "hole in his forehead approximately the size of a golf ball and probably a half inch deep." *Id.* He suffered severe brain damage and died the following day. *Id.*

Both sides acknowledged that "Joshua Flax would not have been seriously injured if the seat in front of him had not yielded rearward." *Id.* Joshua's mother, Rachel Sparkman, seated in the back seat with Joshua, was the first to see his "smashed in" forehead. *Id.*

1. On May 7, 2002, Jeremy Flax and Rachel Sparkman filed this lawsuit against Louis Stockell, the driver of the pick-up that rear-ended the minivan, and Petitioner, the manufacturer of the minivan. *Id.* at 5a-6a. The complaint alleged, *inter alia*, that the minivan's seats were weak, defective, and unreasonably dangerous and that Petitioner failed to warn consumers that the seats posed a danger to children seated behind them. *Id.* at 6a. Plaintiffs jointly sought recovery for Joshua's wrongful death, and plaintiff Rachel Sparkman, individually, sought recovery on her negligent infliction of emotional distress ("NIED") claim for what she experienced from observing the injuries to her 8-month-old son. *Id.* Plaintiffs alleged that Petitioner acted "recklessly" and sought punitive damages on both claims. *Id.*

During the lengthy first phase of the trial, Plaintiffs put on evidence that included internal memoranda of Petitioner and the testimony of its own employees, which demonstrated two decades of conscious indifference to the very dangers of Petitioner's collapsing minivan seat backs revealed in this incident. *Id.* at 20a-28a, 32a. As early as 1980, meeting minutes revealed that seat backs had yielded "in every crash test" but that any improvements were resisted because they would entail additional "'development costs'" and a "'piece penalty.'" *Id.* at 20a. Petitioner's own crash test videos "confirm that in rear-impact collisions the seats yielded into the occupant space behind them." *Id.* Petitioner's internal memoranda showed that the seats were so weak that, in rear crash tests, "the front seats were braced to prevent the seatbacks from impacting [testing] equipment occupying the back seat" where a child would be sitting. *Id.* at 21a. During the "mid-1980s," Petitioner also "began to receive reports of children injured by yielding seatbacks in rear-end collisions," including "skull or facial fractures." *Id.* at 21a.

Alarmed by this knowledge, in the early 1990s, Petitioner formed the Minivan Safety Leadership Team ("MSLT"), chaired by Paul Sheridan, an employee of Petitioner. *Id.* The MSLT sought "to address safety concerns in [Petitioner's] minivans," including specifically "the issue of seat back strength." *Id.* The MSLT studied "complaints regarding injuries caused by yielding seat backs." *Id.* At its March 16, 1993, meeting, the MSLT "reached a consensus that it was

unacceptable for seats to yield rearward into the passenger space behind them and that the seats were *inadequate to protect customers.*" *Id.* at 21a-22a (emphasis added). "After the meeting, Mr. Sheridan distributed the minutes of the meeting to various [Petitioner] executives." *Id.* at 22a. Later, Francois Castaing, a Petitioner executive in charge of engineering, ordered Sheridan to "retrieve the minutes of the meeting and destroy them." *Id.* Mr. Sheridan complied with that direction but retained two copies in his office. *Id.*

"In September 1994, Mr. Sheridan told his supervisor that he was going to go to regulators with his concerns about the minivan seatbacks." *Id.* Petitioner's response was to "disband" the MSLT, "fire" Mr. Sheridan, and "confiscate" the MSLT minutes from Mr. Sheridan's office. *Id.* at 22a-23a. As the Tennessee Supreme Court held, Petitioner's "efforts to destroy the recommendations produced by the MSLT are a further indication of [Petitioner's] awareness of the seatback problem and its determination to hide the problem rather than solve it." *Id.* at 23a. In spite of this knowledge, Petitioner "did not issue any warning to customers and continued to advertise the Caravan as a vehicle specifically designed to protect children." *Id.* at 21a.

The jury concluded that the seats were "defective and unreasonably dangerous" and that Petitioner "had consciously disregarded a known, substantial, and unjustifiable risk to [Respondents]" in designing these seats. *Id.* at 25a. The jury awarded compensatory

damages for the wrongful death of Joshua Flax in the amount of \$5 million, apportioned evenly between Petitioner and Stockwell. The jury also awarded \$2.5 million to Ms. Sparkman for her NIED claim. *Id.* at 7a.

Phase II of the jury trial was devoted solely to the amount of punitive damages, after the jury had determined by clear and convincing evidence in Phase I that Petitioner had acted “recklessly” and that its misconduct warranted punitive damages. *Id.* at 6a-7a. In Phase II, the jury awarded a total of \$98 million in punitive damages, divided as \$65.5 million for the wrongful death claim and \$32.5 million for the NIED claim. *Id.*

In the months following the verdict, the trial judge conducted a *de novo* review of the punitive damages award as required by *Hodges v. S.C. Toof Co.*, 833 S.W.2d 896, 902 (Tenn. 1992), and *Cooper Industries v. Leatherman Tool Group*, 532 U.S. 424, 436 (2001). Pet. App. 7a, 165a-76a (trial court findings of fact and conclusions of law). In an extensive post-trial order, the trial judge concluded that the jury “properly found” that Petitioner “acted recklessly and that punitive damages were warranted.” *Id.*

In those independent findings of fact and conclusions of law, the trial judge further found Petitioner “had the weakest seat design strength requirement of all the other manufacturers,” as shown by Petitioner’s own documents, *id.* at 167a; the “front seat collapsed backward into the back area where a child would be

sitting" in "all of the [Petitioner's] . . . rear impact crash tests," *id.*; Petitioner "had knowledge that these seats were unreasonably dangerous" and knew the "'child could be impacted by that seat,'" *id.* at 167a-68a; "[t]he motivation for [Petitioner's] conduct was to avoid spending the extra money to fix the problem of a weak seat back design," *id.* at 172a; Petitioner's "reckless conduct, concealment of its knowledge, and failure to warn resulted in the injury and death of plaintiffs' only child," *id.* at 171a; and Petitioner's "reprehensible conduct of concealing and not warning customers of the known dangers of putting children behind yielding seats supports a substantial jury award." *Id.* at 171a-72a.

Then, after applying this Court's jurisprudence from *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), the trial court determined that the punitive damages exceeded proper proportionality and ordered the award remitted from \$98 million to \$20 million. Pet. App. 7a, 175a-76a. That remittitur resulted in a final award of \$13,367,345 in punitive damages against Petitioner on the wrongful death claim and \$6,632,655 in punitive damages on Ms. Sparkman's NIED claim. *Id.* at 7a.

2. On appeal to the Tennessee Court of Appeals, Petitioner challenged the awards of compensatory and punitive damages, but elected not to raise any issue regarding the jury charges governing liability for, or the amount of, punitive damages. *Id.* at 7a-8a,

36a-37a. The court of appeals determined that Ms. Sparkman's individual NIED claim failed to meet the heightened proof requirements for such claims under Tennessee law and vacated the award of both compensatory and punitive damages to Ms. Sparkman individually on the NIED claim. *Id.* at 7a-8a. The court of appeals also held the evidence was insufficient to establish by clear and convincing evidence that Petitioner acted recklessly. *Id.* at 8a. Accordingly, the court of appeals vacated the remaining award of punitive damages on the wrongful death claim as well. *Id.* The court of appeals affirmed the award of \$5 million in compensatory damages on the wrongful death claim (only \$2.5 million of which was allocated against Petitioner). *Id.*

3. Respondents filed a discretionary application for appeal to the Supreme Court of Tennessee, which was granted. *Id.* Respondents challenged the court of appeals' vacation of the NIED award to Ms. Sparkman and both punitive awards. *Id.* The supreme court affirmed the ruling vacating the NIED damages (and the award of punitive damages appended to that claim). *Id.* at 16a.

However, after *de novo* review of a trial record "consisting of thousands of pages of pleadings, testimony, and exhibits," *id.* at 73a (Wade, J., concurring), the supreme court reversed the court of appeals ruling as to the sufficiency of the evidence of recklessness and reinstated the \$13,367,345 in punitive damages on the wrongful death claim. *Id.* at 25a, 36a, 45a-46a. The Tennessee Supreme Court's exhaustive

review of the “wealth of evidence,” *id.* at 44a, supporting Respondents’ punitive damages claims sustained the conclusion that the “jury’s finding of recklessness” was “supported by clear and convincing material evidence” and “that there is no serious or substantial doubt that [Petitioner] consciously disregarded a known, substantial, and unjustifiable risk to the plaintiffs.” *Id.* at 25a-26a.

The evidence demonstrated that Petitioner “deceitfully covered up evidence of the deficiencies of its seat design” while advertising to the public the vehicle’s safety for children. *Id.* at 32a. Moreover, the evidence showed that Petitioner’s “wrongdoing was not an isolated incident because [Petitioner] had knowledge of the danger its seats posed to the public for years and yet continued to sell its vehicles in an unreasonably dangerous condition throughout the State of Tennessee.” *Id.* The supreme court further concluded that Petitioner’s conduct was “clearly . . . reprehensible” and “evince[d] a conscious disregard for the safety of others.” *Id.* at 31a-32a.

Applying this Court’s directives in *BMW* and *State Farm*, the supreme court concluded that Petitioner had “fair notice” its reckless conduct could “subject it to a severe penalty.” *Id.* at 32a; *see also id.* at 28a-35a & 35a n.8. Analyzing the evidence under the aggravating factors regime articulated in *State Farm*, the court found this case to involve “a tragic experience that is far more serious than a mere economic loss . . . a conscious disregard for the safety of others . . . deceit[] . . . [and] not an isolated

incident." *Id.* 31a-32a. Thus, the misconduct was "clearly . . . reprehensible." *Id.* at 31a.

The supreme court then approved a ratio of 1 to 5.35 between the \$2.5 million in compensatory damages for which Petitioner was liable based on the jury's 50% allocation of fault to it for wrongful death and the \$13,367,345 in punitive damages upheld on that claim. *Id.* at 32a-36a.¹ Finally, the court considered the comparability guidepost, finding no close analogy but using Tenn. Code. Ann. § 40-35-111(c)(4) (2006) as the statute that "most closely expresses" a point of comparison. Pet. App. 33a. The court nonetheless concluded that the other guideposts bear "considerably more weight" and that the fine authorized by statute would be inadequate to punish and deter Petitioner. *Id.* at 36a. On this record, therefore, the Tennessee Supreme Court confirmed the award fell within the constitutionally permissible spectrum of valid awards. *Id.*

¹ If one compares the total actual harm indisputably caused by the failure of Petitioner's defective product (total \$5 million wrongful death award) to the punitive damages awarded against Petitioner (\$13 million), the real ratio is less than 3 to 1. The ratio is even lower when one considers the potential harm, which would include the obvious emotional distress of a mother seeing her only child's head crushed as well as the impact of the event on the other passengers. See *State Farm*, 538 U.S. at 418 (stating the guidepost considers "the disparity between the *actual* or *potential harm* suffered by the plaintiff and the punitive damages award.") (emphasis added).

In addition, the court declined to consider whether a requested jury instruction constituted error because Petitioner had not raised the issue before the court of appeals. Following longstanding state practice, the supreme court stated that “[l]itigants who hope to have an issue heard by this Court must first present that issue to the intermediate appellate court.” *Id.* at 36a-37a (citing *Brown v. Crown Equip. Corp.*, 181 S.W.3d 268, 281 n.5 (Tenn. 2005); *Va. & Sw. R.R. v. Sutherland*, 197 S.W. 863, 864 (Tenn. 1917)).

REASONS FOR DENYING THE PETITION

The Petition does not meet any established criteria warranting certiorari. *See* Sup. Ct. R. 10. There is no need to “clarify” (Pet. 9) whether the Due Process Clause’s substantive protections against “excessive” or “unreasonable” awards of punitive damages create an absolute bar to the imposition of punitive damages in a products liability action in which a manufacturer has complied with “minimum” federal regulatory standards that lack preemptive effect.² This Court’s decision in *Silkwood v.*

² Since 1974, Federal Motor Vehicle Safety Standard (“FMVSS”) 207, 49 C.F.R. § 571.207, has set the bare “minimum” seatback strength that every vehicle manufactured or imported into the U.S. must have just to be sold in this country. *See* 49 U.S.C. § 30102(a)(9) (2009) (FMVSS are “minimum” standards). It requires every seat sold to have at least a “minimum”

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Kerr-McGee Corp., 464 U.S. 238 (1984), forecloses that view, and to date no lower court has adopted Petitioner's sweeping view of Due Process. Moreover, states, including Tennessee, have long exercised their sovereign authority in deciding what particular value to accord a manufacturer's compliance with federal safety standards in products liability actions – with Tennessee and the majority of states deciding that compliance establishes, at most, a rebuttable presumption that a product is not unreasonably dangerous. States have exercised that authority without any intimation from this Court that the Due Process guarantee of "fair notice" *requires* them to accord such compliance an irrebuttable presumption that a design is not defective even where, as here, a manufacturer has actual knowledge that its design is defective, engages in a cover-up of that knowledge, and consciously disregards the risks associated with that design. Petitioner's attempt to locate such a rule within the Due Process Clause is a fanciful exercise

strength when statically pulled with 20 times the weight of the seat back (or approximately 300 lbs. of force) applied to the mid part of the seat back in a laboratory (which equates to 3,300 inch-pounds of torque). 49 C.F.R. § 571.207. FMVSS 207 does *not* test the performance of a seat in a rear crash and sets no "performance guideline" at all for a seat in a rear or any other kind of crash. *Id.* Similarly, FMVSS 207 did not "set" the "optimum" strength of a seat or "prescribe" any "set" strength other than requiring that all seats exceed a bare "minimum" or "floor." *See id.* In fact, Petitioner's lead seat engineer testified that FMVSS 207 "requires 'inadequate seat strength to insure that the seat does not fail'" in rear impacts. Pet. App. 24a.

that does not merit this Court's serious engagement. *Cf. Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (noting that this Court should be "reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.").

Nor is certiorari warranted to consider whether the evidence in this case supports the award of punitive damages, or whether the Tennessee Supreme Court misapplied this Court's well-established criteria for determining whether an award is constitutionally excessive. The Tennessee Supreme Court faithfully and meticulously applied this Court's precedents to the egregious facts disclosed by this record. Each of the three considerations, articulated by this Court in *BMW* and explained in its progeny, factored into the court's Due Process analysis. The weight the court attributed to these considerations is entirely consistent with this Court's precedents, which mark the reprehensibility factor as the "most important indicium of reasonableness of a punitive damages award." *BMW*, 517 U.S. at 575. Thus, review of the Tennessee Supreme Court's application of a properly stated rule of law does not warrant certiorari. *See* Sup. Ct. R. 10 ("certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Finally, certiorari is inappropriate to consider whether the trial court's failure to give a requested jury instruction on harm to non-parties violates

Petitioner's Due Process rights. Petitioner assigned no error to this issue in its first appeal, thereby waiving the issue for all subsequent appeals under adequate and independent state procedure.

I. THERE IS NO DIVISION OF AUTHORITY REGARDING WHETHER THE DUE PROCESS CLAUSE BARS AN AWARD OF PUNITIVE DAMAGES WHERE A MANUFACTURER HAS COMPLIED WITH "MINIMUM" FEDERAL STANDARDS

The Due Process Clause imposes substantive limits on the broad discretion that States possess with respect to the imposition of punitive damages. *Cooper Indus.*, 532 U.S. at 433. These substantive limits, however, have never been understood to create an absolute bar to the imposition of punitive damages in a products liability action in which a manufacturer has complied with "minimum" federal regulatory standards that nonetheless lack preemptive effect.³ And no court has subscribed to this suspect view of the Due Process Clause, which Petitioner here advances. (See Pet. 13).

³ Petitioner does not argue that FMVSS 207, which addresses seatback strength, preempts Respondents' suit for compensatory damages. Nor does it contend that FMVSS 207 somehow preempts punitive damages, but not compensatory damages. Cf. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2609 (2008).

In fact, Petitioner's theory that "compliance with objective indicators of reasonable conduct, such as industry custom and federal standards . . . precludes punitive damages" as a matter of federal Due Process (Pet. 12) directly conflicts with this Court's decision in *Silkwood*, 464 U.S. 238. There, the Court held that a federal statute did not preclude an Oklahoma court from awarding punitive damages in a case in which the alleged tortfeasors had substantially complied with a federal regulatory scheme. *Id.* at 258. This Court then remanded the case to the Tenth Circuit for consideration of any remaining issues, which included whether substantial compliance with a regulatory scheme bars the award of punitive damages *as a matter of Oklahoma law*, and whether "the amount of the punitive damages award was excessive." *Id.*; see also *Silkwood v. Kerr-McGee Corp.*, 769 F.2d 1451, 1457 (10th Cir. 1985) (deciding, on remand, that Oklahoma law does not categorically bar punitive damages based on substantial compliance). This Court's *Silkwood* decision would make no sense were compliance with a regulatory scheme itself dispositive of the Due Process inquiry.

States undoubtedly have the authority to determine what value to accord a manufacturer's compliance with "minimum" federal regulations in products liability actions. See *RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB.* § 4 (1998); see also, e.g., *Schultz v. Ford Motor Co.*, 857 N.E.2d 977, 988 (Ind. 2006) (recognizing state authority "to place some particular value upon compliance with federal safety

standards"). Indeed, this Court has repeatedly recognized that "where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law." *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278 (1989). After all, a constitutionally valid award is one "supported by the State's interest in protecting its own consumers and its own economy." *BMW*, 517 U.S. at 572.

Tennessee's approach cloaks a manufacturer whose conduct complies with federal regulations with a rebuttable presumption that its product is not unreasonably dangerous. See Tenn. Code. Ann. § 29-28-104. A plaintiff may overcome this presumption through clear and convincing evidence that the defendant has actual knowledge of the defect and deliberately disregards the foreseeable consequences resulting from the defect. Pet. App. 27a (explaining that § 29-28-104 "was not designed to provide immunity from punitive damages to a manufacturer who is aware that compliance with a regulation is insufficient to protect users of the product.... To hold otherwise would create an inflexible rule that would allow some manufacturers knowingly engaged in reprehensible conduct to escape the imposition of punitive damages.").

This framework tracks the laws of several states: compliance with federal regulations or industry custom is strong evidence that a manufacturer is not reckless, but actual knowledge of a defect may

establish reckless conduct warranting punitive damages. *See, e.g., O'Gilvie v. Int'l Playtex, Inc.*, 821 F.2d 1438, 1446 (10th Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988) (Kansas law) ("[C]ompliance with the FDA regulations does not preclude punitive damages when there is evidence sufficient to support a finding of reckless indifference to consumer safety."); *Dorsey v. Honda Motor Co.*, 655 F.2d 650, 657 (5th Cir. 1981) (Florida law) ("[C]ompliance with [federal Motor Vehicle Safety Act Standards], which were far from comprehensive, [did not] preclude[] any finding of recklessness no matter how egregious Honda's conduct had been in ignoring tests that indicated design flaws of a different nature."); *Brown by Brown v. Stone Mfg. Co.*, 660 F. Supp. 454 (S.D. Miss. 1986) (Mississippi law) (compliance with federal flammability standards not conclusive on issue of whether fabric was unreasonably dangerous); *Gen. Motors Corp. v. Moseley*, 447 S.E.2d 302, 311 (Ga. Ct. App. 1994) (rejecting argument that compliance with FMVSS 301 "precludes an award of punitive damages where . . . there is other evidence showing culpable behavior"); *cf. Surles ex rel. Johnson v. Greyhound Lines*, 474 F.3d 288, 300-01 (6th Cir. 2007) (applying Tennessee law and concluding that compliance with federal regulations and common industry practices is evidence of the standard of care but does not conclusively establish the standard of care in negligence cases).⁴

⁴ Petitioner's reliance on *Safeco Ins. Co. v. Burr*, 127 S. Ct. 2201 (2007), is misplaced. That case does not stand for the
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When punitive damages are imposed, states like Tennessee require actual knowledge of the harmful effect or a conscious disregard of it. Cases that reflect compliance with a statutory scheme, without more, will not entitle the plaintiff to recover punitive damages. *See W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* § 36, at 233 n.41 (5th ed. 1984). The reason is obvious: actual knowledge or conscious disregard is difficult to establish but clearly can be proven in the appropriate case. *See, e.g., Tetuan v. A.H. Robins Co.*, 738 P.2d 1210, 1240 (Kan. 1987) ("Far from simply being 'grossly negligent' in marketing the Dalkon Shield, there was substantial evidence to conclude that Robins deliberately, intentionally, and actively concealed the dangers of the Shield for year after year"); *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 481 (N.J. 1986) ("[T]he evidence supports a finding that Johns-Manville knew of the dangers created by its product. Not only did it fail to warn users of the serious health hazards associated with exposure to asbestos, it actually took affirmative

proposition that compliance with government regulations precludes a finding of recklessness because compliance establishes a "reasonable debate" whether a design is in fact defective (Pet. 11). *Safeco* does not speak at all to this issue. See 127 S. Ct. at 2216. Nor is *Safeco*'s definition of common-law recklessness different from the recklessness standard applied in this case. *Compare id.* at 2215 ("recklessness" equals "action entailing 'an unjustifiably high risk of harm that is either known or so obvious that it should be known'"), with Pet. App. 17a ("recklessness" as "consciously disregard[ing] a substantial and unjustifiable risk").

steps to conceal this information from the public"). And where, as here, there is no serious or substantial doubt that the manufacturer had actual knowledge of a defect, deliberately disregarded the foreseeable consequences resulting from the defect, and deceitfully covered up evidence of these deficiencies (see Pet. App. 31a-32a), the manufacturer's claim that it did not have fair notice that its conduct could give rise to punitive damages liability cannot be taken seriously.

The cases Petitioner cites do not help its cause.⁵ Petitioner's reliance on *Richards v. Michelin Tire Corp.*, 21 F.3d 1048 (11th Cir. 1994), is particularly revealing. Petitioner flatly misrepresents the holding of *Richards* by stating judgment was granted to defendant on punitive damages where "the record demonstrates that [the manufacturer] complied with all requisite Federal Motor Vehicle Safety Standards." Pet. 12-13 n.2. In reality, the *Richards* case:

⁵ At most, compliance with applicable safety standards was merely one fact some courts have noted in connection with rejecting a punitive damages claim that was otherwise deficient. See *Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1317 (5th Cir. 1995) (vacating punitive award in light of evidence that "leg guards" on motorcycle were unanimously rejected by industry, scientific community, independent testing and professional organizations, and were unsupported by defendant's testing); *Chrysler Corp. v. Wolmer*, 499 So.2d 823, 826 (Fla. 1986) (vacating punitive award because Chrysler's "test reports" did not support "district court's determination that Chrysler had actual knowledge" that its vehicle was unreasonably dangerous or that it acted with a "wanton disregard for life," but court did not even reach the punitive damages preemption argument).

(1) stated only that “compliance with both federal regulations and industry practices is *some evidence* of due care,” 21 F.3d at 1059 (emphasis added); (2) held only that JNOV was appropriate because the plaintiff “failed to demonstrate sufficient evidence on his wanton design claim,” *id.*; but (3) explicitly rejected the manufacturer’s “invitation to hold” that compliance with a federal safety regulation “precludes a finding of wantonness.” *Id.* at n.21.

As the Tennessee Supreme Court held, Petitioner’s argument that meeting “minimum” standards should immunize a manufacturer from punitive damages would “provide immunity from punitive damages to a manufacturer who is *aware* that compliance with a regulation is *insufficient* to protect users of the product.” Pet. App. 27a (emphasis added); *see also id.* at 28a (punitive damages should not be barred when “a manufacturer *knows* that a . . . practice . . . presents a substantial and unjustifiable risk to consumers.”) (emphasis added).⁶

This record revealed that Petitioner had the “weakest seat design strength” of all manufacturers

⁶ Petitioner’s own engineers and expert witnesses admitted FMVSS 207’s “minimum” strength level was “inadequate” and “insufficient.” Pet. App. 24a (“seat engineer employed by [Petitioner] testified that FMVSS 207 requires ‘inadequate seat strength’”; “[Minivan Safety Leadership Team] agreed that compliance with FMVSS 207 was insufficient to ensure safety of consumers”; “both of [Petitioner’s] experts on seat design agreed that compliance with FMVSS 207 alone is inadequate to protect passengers.”).

to which Petitioner compared itself; Petitioner's *family* minivan front seats collapsed into the back seat where a child would be sitting in *every* rear crash test Petitioner ran on a minivan for 20 years; Petitioner even had to brace the front seats in the tests to keep the seats and the dummies in them from collapsing upon and damaging the testing equipment located exactly where a child would be seated in the second row; for 20 years, Petitioner received complaints of children and adults being injured and killed by collapsing minivan seats; Petitioner's own Minivan Safety Leadership Team studied collapsing minivan seats, determined that the collapsing minivan seat was "unacceptable," and concluded that the minivan seats "were inadequate to protect customers"; Petitioner's response from the highest levels of the corporation to the MSLT's conclusions was to "retrieve and destroy" the minutes of the MSLT, disband the committee, and fire its chairman; Petitioner declined to strengthen the minivan seat because of "cost"; Petitioner "concealed" its knowledge of the risks of death and serious injury from collapsing minivan seats; instead of warning, Petitioner encouraged parents to place their *own children* directly behind seats Petitioner knew would collapse yet "advertise[d] the Caravan as a vehicle that put children's safety first." (See *supra* pp. 3-6).

Any defendant pursuing that course of ongoing, deliberate misconduct has more than "fair notice" of the possibility of a substantial punitive damage award: such an award should be *expected*. In view of

this record, Petitioner's "fair notice" claim does not merit exercise of this Court's discretion to review the issue.

II. THE TENNESSEE SUPREME COURT FAITHFULLY FOLLOWED THIS COURT'S PUNITIVE DAMAGE PRECEDENTS

This Court should decline Petitioner's invitation to review the Tennessee Supreme Court's affirmation of an unremarkable punitive damage award – one that is both reasonable and proportionate to the fatal injuries suffered by a child and the potential injuries to the child's mother, who was one of the plaintiffs in this case. The Tennessee Supreme Court faithfully and meticulously applied this Court's teachings on punitive damages to the egregious facts disclosed by this record. The court separately considered each of the three guideposts set forth in *BMW*, and the weight attributed to these considerations is entirely consistent with this Court's precedents.

Petitioner makes three separate arguments under the umbrella of a meritless claim that the punitive damages are excessive. First, it claims the Tennessee Supreme Court ignored Petitioner's compliance with "minimum" federal regulatory standards. Pet. 16. This argument constitutes little more than a repeat of its first Question Presented in barely different garb. Moreover, as the decision below demonstrates, the supreme court did not ignore but confronted that compliance. The court found that it

could not excuse Petitioner's actual knowledge of its seatbacks' inadequacy or its cover-up of a defect that posed a serious danger to its customers' safety. Pet. App. 27a.

Second, Petitioner elides its own egregious misconduct and the fact that the "*most important indicium* of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *State Farm*, 538 U.S. at 419 (quoting *BMW*, 517 U.S. at 575 (emphasis added)). Instead, Petitioner asserts that the Tennessee Supreme Court gave short shrift to the third *BMW* guidepost, comparability, and seeks to establish that guidepost as the most important guidepost as to the reasonableness of a punitive damages verdict.

Petitioner's attempt to elevate the third guidepost into a conclusive and overriding factor when compared to the two others is freighted with mischief. If adopted, it would transform the historically validated test that requires that punitive damages match the gravity of the offense, *see BMW*, 517 U.S. at 575 ("the enormity of the offense") (quoting *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851)), into a battle of comparables. Parties would inundate the court with analogous legislative judgments and *presentations of the record* in other punitive cases in order to make meaningful comparisons.

In this case, the supreme court was unable to identify a statutory penalty that would be directly applicable to the long-term pattern of recklessness

and conscious indifference that resulted in the death of a child and that would be comparable to Petitioner's misconduct. Instead, the closest analogous penalty was a fine of only \$125,000 that can be imposed on a corporation for a reckless homicide under Tenn. Code. Ann. § 39-13-215. The supreme court did not believe, however, that this criminal statute could reasonably have given Petitioner or any other manufacturer comfort that it would not be subject to a large punitive damages award as a result of reckless conduct shown by the evidence in this case. Rather, the court cited its decision in *Hodges*, 833 S.W.2d at 901-02, which listed the factors governing a punitive damages award which were "sufficient to provide [Petitioner] with notice that consciously disregarding the safety of Tennessee citizens could subject it to a considerably large punitive damage award." Pet. App. 35a & n.8. Nor did the court consider such a minuscule fine effective in punishing or deterring the misconduct at issue. *Id.* at 36a.

Nothing in this Court's jurisprudence recommends taking the highly reprehensible misconduct here, concluding that the award is justified on that basis and is proportionate to the harm done, and then reducing it to the level of an ill-fitted legislative fine or penalty, as Petitioner proposes. The inappropriateness of Petitioner's argument is underscored by the analysis this Court undertook in *State Farm*, where this Court described the misconduct at issue there as low on the reprehensibility scale, identified a \$10,000 criminal fine as the most

relevant comparable, and still suggested that the punitive damages should be on the order of \$1 million. *State Farm*, 538 U.S. at 419, 429. Critically, this Court noted that a “criminal penalty has less utility” to help “determine the dollar amount of the award” than it has in relating the “seriousness with which a State views the wrongful action.” *Id.* at 428. Review of Petitioner’s claim on the comparability prong of Due Process analysis is not warranted, and Petitioner’s argument lacks merit.

Finally, as part of its excessiveness argument, Petitioner suggests the untenable claim that the 1:1 ratio this Court suggested in *State Farm*, 538 U.S. at 429, comprises a constitutional maximum for every award of \$1 million or more. Pet. 25-30. In advancing this unjustified claim, Petitioner manufactures a mathematical bright-line straitjacket out of precedential cloth that this Court has repeatedly, categorically, and wisely declared cannot be woven together. See *State Farm*, 538 U.S. at 424-25 (“[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. . . . We decline **again** to impose a bright-line ratio which a punitive damages award cannot exceed.”) (emphasis added; citations omitted). See also *BMW*, 517 U.S. at 582 (“[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula”); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) (“We need not, and indeed we cannot, draw a mathematical bright line between the

constitutionally acceptable and the constitutionally unacceptable.") (emphasis added).

In fact, the same paragraph in *State Farm* that suggests a single-digit ratio was "perhaps" appropriate when the compensatory award was "substantial" reiterated that "there are no rigid benchmarks that a punitive damages award may not surpass" and that "[t]he precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *State Farm*, 538 U.S. at 425.

The "facts and circumstances," as the Tennessee Supreme Court found, justify this award. It is further justified because "the monetary value of noneconomic harm might have been difficult to determine." *Id.* (citations omitted). It is well established that wrongful death damages fail to compensate for the harm to the decedent. See A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 941-42 (1998); see also WILLIAM LANDES & RICHARD POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 187 (1987) (concluding there is a "systematic underestimation of damages in a wrongful-death case"). Because wrongful death damages largely reflect the financial contribution of the decedent to the family, awards for the death of a child are comparatively low. Polinsky & Shavell, 111 HARV. L. REV. at 941 n.229. Thus, this is "an area of law in which the measurement of loss in pecuniary terms presents intractable difficulties." Dorsey D.

Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 30 n.140 (1982).

This Court has mandated a fact-sensitive inquiry for excessiveness. The Tennessee Supreme Court discharged that mandate with utmost care after *de novo* review of this extensive record. As a result, it is utterly improper to examine the few cases with substantial compensatory damage awards as well as punitive damages across the circuits and purport to compare whether they fall uniformly within a 1:1 ratio, as Petitioner suggests. Petitioner's invitation would elevate "ratio" to greater importance than "reprehensibility," which has always been justifiably preeminent in this Court's Due Process jurisprudence.

The fact that this punitive damage award is well within a single-digit ratio, without considering potential harm for which punitive damages were originally awarded but vacated, clearly indicates that the award crosses no impermissible lines. This award warrants no further review.

III. PETITIONER FAILED TO RAISE THE INSTRUCTIONAL ISSUE ON APPEAL AND WAIVED ANY ERROR

Petitioner admits that it did not argue as error the trial court's failure to give its proposed instruction barring punishment for injuries sustained by non-parties. Pet. 30-31. Petitioner attempts to excuse that neglect by claiming it *did* argue in the court of

appeals error regarding the admission of evidence of harm to non-parties. *Id.* (citing *Philip Morris USA v. Williams*, 549 U.S. 346 (2007)) (“*Williams I*”). Petitioner’s third Question Presented seeks a GVR in light of this Court’s prospective treatment of *Philip Morris USA v. Williams*, No. 07-1216, 2009 WL 814803 (U.S. Mar. 31, 2009) (“*Williams II*”), which this Court has now reached, dismissing the matter as improvidently granted by per curiam order dated March 31, 2009. As a result, there is no reason to take up Petitioner’s now mooted GVR request, and that should end the inquiry on Petitioner’s third Question Presented.

Even if this Court had not dismissed *Williams II*, however, there still would have been no basis to take up Petitioner’s third question for three essential reasons.

First, Petitioner’s current argument is a patently different one from the claim of error concerning jury instructions in *Williams II* and does not cure Petitioner’s waiver of its claim of instructional error. Second, the argument Petitioner did put forth in the court of appeals was manifestly incorrect as a matter of law. Finally, at Petitioner’s request, Petitioner had the benefit of a conforming procedure that assured the punitive damages do not reflect improper considerations.

In *Williams I*, this Court specifically held that evidence of harm to non-parties was admissible, contrary to the argument Petitioner put forth in the

court of appeals. This Court quoted the Oregon Supreme Court with approval about the relevance of harm to non-parties when it said that the “jury could consider whether Williams and his misfortune were merely exemplars of the harm that Philip Morris was prepared to inflict on the smoking public at large.” 549 U.S. at 356 (quoting *Williams v. Philip Morris, Inc.*, 340 Or. 35, 51, 127 P.3d 1165, 1175 (2006)). After all, “harm to others shows more reprehensible conduct” and remains part of the punitive damage equation. 549 U.S. at 355. Thus, Petitioner’s only remotely relevant argument before the court of appeals was patently wrong as a matter of law.

Petitioner’s utter neglect of any jury instruction issue at the court of appeals constituted abandonment of Petitioner’s claimed *Williams II* issue that it (now mootly) asked this Court to hold for potential GVR treatment. At trial, Petitioner submitted an (albeit erroneous) instruction relating to punishment and the use of evidence of harm to nonparties.⁷ Pet. App. 37a. In the intermediate appellate court, however, Petitioner “did not question the rejection of its proposed jury instruction.” *Id.* When Petitioner attempted “to resurrect this issue” before the Tennessee Supreme Court, the court ruled that the failure to preserve the issue in Petitioner’s appeal to court of appeals operates as a waiver of the claim of error

⁷ The instruction adhered to Petitioner’s erroneous view that evidence of harm to nonparties was inadmissible in the punitive-damage phase of the case. Resp. App. 17a-18a.

under longstanding state appellate rules. *Id.* (citing *Brown*, 181 S.W.3d at 281 n.5; *Sutherland*, 197 S.W. at 864 (“These are the only errors that were assigned in the Court of Civil Appeals. Others attempted to be assigned here must be overruled”)). *See also Alexander v. Armentrout*, 24 S.W.3d 267, 273 (Tenn. 2000) (where “counsel made no argument regarding the Statute of Frauds to the Court of Appeals,” the “issue was not properly preserved for appeal, it is waived and will not be considered by this Court.”).

That waiver is sufficient to deny the Petition as to the third Question Presented. This Court has repeatedly adhered to its declaration that “[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court.” *Youakim v. Miller*, 425 U.S. 231, 234 (1976). *See also Matsushita Elec. Indus. v. Epstein*, 516 U.S. 367, 379 n.5 (1996) (Court “generally do[es] not address arguments that were not the basis for the decision below.”); *Duignan v. United States*, 274 U.S. 195, 200 (1927) (same).

While this limitation on issues eligible for review comprises a prudential consideration, rather than a restriction on jurisdiction, this Court has made plain that it will not depart from that general rule absent a showing of “unusual circumstances.” *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992) (citation omitted). No unusual circumstances in this case justify an exception to this well established rule. Permitting a party, after a first appeal of right, to “discover” new arguments in order to keep a case alive undermines the orderly administration of

justice, as well as fundamental precepts of fairness. A court properly looks askance at such a request in order to prevent parties from formulating an endless string of new issues for further appellate consideration. The uncompromising approach enunciated by the Tennessee Supreme Court in its repeated decisions on this issue serve as a bulwark against such misuse of the appellate system.

Raising the issue on appeal for the first time in a subsequent discretionary appeal before the Tennessee Supreme Court, which under its rules will not entertain an issue not raised and argued at the prior appellate level, does not constitute presentation and denial by the lower court as is necessary to invoke this Court's jurisdiction. This case presents no warrant to depart from the sound policy of denying certiorari to issues not considered below.

Even without Petitioner's indisputable waiver of the issue, Petitioner is entitled to no relief. Specifically, Petitioner's proposed instruction No. 22 contradicts *Williams I* and is an incorrect statement of law. In that instruction, (Resp. App. 17a-18a), the first sentence stated: "In determining the appropriate amount of punitive damages, if any, in this case, you may consider *only the harm to the plaintiff in this case.*" (Emphasis added). That instruction was clearly an incorrect statement of law, as *Williams I* itself confirmed. This Court held the jury *could* consider "actual harm to nonparties" in determining the reprehensibility of Petitioner's misconduct, 549 U.S. at 355, and that determination remains the "most

important indicium of the reasonableness of a punitive damages award." *BMW*, 517 U.S. at 575. Plaintiffs objected to Petitioner's request, and the trial court properly declined to give it. Pet. App. 37a.

Third, Petitioner is entitled to no relief because the trial judge's and supreme court's actions in reviewing and remitting the verdict to ensure no punishment for harm to nonparties are exactly what this Court invited state courts to do in *Williams I*. Specifically, Tennessee's *Hodges* framework for the trial judge's *de novo* review, findings of fact, and conclusions of law reducing and/or approving the award epitomizes the very "procedures" contemplated by *Williams I* to ensure the defendant is not punished "directly on account of harm" to others. See *Williams I*, 549 U.S. at 356 (approving "flexibility" of state to address issue with instructions or "procedures," including contemplating that the state court itself could make "a change in the level of punitive damages"). The trial judge's *Hodges* review resulted in a reduction in the amount of punitive damages from \$98 million to \$20 million, and the supreme court upheld only \$13 million of that amount. The combined actions of the trial judge and supreme court reduced the ratio to less than 3 to 1 of punitive damages total harm caused by Petitioner's conduct, or 5.35 to 1 of punitive damages to Petitioner's allocated share of compensatory damages. Pet. App. 7a. Further, in setting the remitted punitive damages award, the trial judge's order made clear he considered the notice of injuries to nonparties from other similar

product failures solely on the issue of Petitioner's "notice," "knowledge," or "reprehensibility." Pet. App. 167a-68a.; *see also id.* at 170a-71a (considering Petitioner's "aware[ness] that its yielding minivan seats were causing injury and death to children" under *Hodges* subpart 2 – "reprehensibility"). Most important, when selecting the remitted amount of punitive damages, the trial court considered solely the relationship or ratio of the compensatory damages or harm *in this case* to the punitive damages. *Id.* at 175a-76a.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

April 6, 2009

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APPENDIX A

Tenn. Code Ann. § 40-35-111

Title 40: Criminal Procedure

CHAPTER 35 - CRIMINAL SENTENCING REFORM ACT OF 1989

Part 1 - General Provisions

§ 40-35-111 - Authorized sentences; prison terms or fines; reports

* * *

(c) A sentence to pay a fine, when imposed on a corporation for an offense defined in title 39 or for any offense defined in any other title for which no special corporate fine is specified, is a sentence to pay an amount, not to exceed:

* * *

(4) One hundred twenty-five thousand dollars (\$125,000) for a Class D felony

APPENDIX B

49 C.F.R. § 571.207

Title 49: Transportation

PART 571 – FEDERAL MOTOR VEHICLE SAFETY STANDARDS

Subpart B – Federal Motor Vehicle Safety Standards

§ 571.207 Standard No. 207; Seating systems.

S1. Purpose and scope. This standard establishes requirements for seats, their attachment assemblies, and their installation to minimize the possibility of their failure by forces acting on them as a result of vehicle impact.

S2. Application. This standard applies to passenger cars, multipurpose passenger vehicles, trucks and buses.

S3. Definitions.

Seat adjuster means the part of the seat that provides forward and rearward positioning of the seat bench and back, and/or rotation around a vertical axis, including any fixed portion, such as a seat track. In the case of a seat equipped with seat adjusters at different levels, the term means the uppermost seat adjuster.

S4. Requirements.

S4.1. Driver's seat. Each vehicle shall have an occupant seat for the driver.

<Text of S4.2 intro. par. effective until April 20, 2009.>

S4.2. General performance requirements. When tested in accordance with S5., each occupant seat, other than a side-facing seat or a passenger seat on a bus, shall withstand the following forces, in Newtons.

<Text of S4.2 intro. par. effective April 20, 2009.>

S4.2. General performance requirements. When tested in accordance with S5, each occupant seat shall withstand the following forces, in newtons, except for: a side-facing seat; a passenger seat on a bus other than a school bus; a passenger seat on a school bus with a GVWR greater than 4,536 kilograms (10,000 pounds); and, a passenger seat on a school bus with a GVWR less than or equal to 4,536 kg manufactured before October 21, 2011.

(a) In any position to which it can be adjusted – 20 times the mass of the seat in kilograms multiplied by 9.8 applied in a forward longitudinal direction;

(b) In any position to which it can be adjusted – 20 times the mass of the seat in kilograms multiplied by 9.8 applied in a rearward longitudinal direction;

(c) For a seat belt assembly attached to the seat - the force specified in paragraph (a), if it is a forward facing seat, or paragraph (b), if it is a rearward facing seat, in each case applied simultaneously with the forces imposed on the seat by the seat belt assembly when it is loaded in accordance with S4.2 of § 571.210; and

(d) In its rearmost position - a force that produces a 373 newton meters moment about the seating reference point for each designated seating position that the seat provides, applied to the upper cross-member of the seat back or the upper seat back, in a rearward longitudinal direction for forward-facing seats and in a forward longitudinal direction for rearward-facing seats.

S4.2.1. Seat adjustment. Except for vertical movement of nonlocking suspension type occupant seats in trucks or buses, each seat shall remain in its adjusted position when tested in accordance with the test procedures specified in S5.

S4.3. Restraining device for hinged or folding seats or seat backs. Except for a passenger seat in a bus or a seat having a back that is adjustable only for the comfort of its occupants, a hinged or folding occupant seat or occupant seat back shall -

5a

- (a) Be equipped with a self-locking device for restraining the hinged or folding seat or seat back, and
- (b) If there are any designated seating positions or auxiliary seating accommodations behind the seat, either immediately to the rear or to the sides, be equipped with a control for releasing that restraining device.

S4.3.1. Accessibility of release control. If there is a designated seating position immediately behind a seat equipped with a restraining device, the control for releasing the device shall be readily accessible to the occupant of the seat equipped with the device and, if access to the control is required in order to exit from the vehicle, to the occupant of the designated seating position immediately behind the seat.

S4.3.2. Performance of restraining device.

S4.3.2.1 Static force.

- (a) Once engaged, the restraining device for a forward-facing seat shall not release or fail when a forward longitudinal force, in newtons, equal to 20 times the mass of the hinged or folding portion of the seat in kilograms multiplied by 9.8 is applied through the center of gravity of that portion of the seat.

(b) Once engaged, the restraining device for a rearward-facing seat shall not release or fail when a rearward longitudinal force, in newtons, equal to 8 times the mass of the hinged or folding portion of the seat in kilograms multiplied by 9.8 is applied through the center of gravity of that portion of the seat.

S4.3.2.2. Acceleration. Once engaged, the restraining device shall not release or fail when the device is subjected to an acceleration of 20 g., in the longitudinal direction opposite to that in which the seat folds.

S4.4. Labeling. Seats not designated for occupancy while the vehicle is in motion shall be conspicuously labeled to that effect.

S5. Test procedures.

S5.1. Apply the forces specified in S4.2(a) and S4.2(b) as follows:

S5.1.1. For a seat whose seat back and seat bench are attached to the vehicle by the same attachments.

(a) For a seat whose seat back and seat bench are attached to the vehicle by the same attachments and whose height is adjustable, the loads are applied when the seat is in its highest adjustment position in accordance with the procedure or procedures specified in S5.1.1(a)(1),

S5.1.1(a)(2), or S5.1.1(a)(3), as appropriate.

- (1) For a seat whose center of gravity is in a horizontal plane that is above the seat adjuster or that passes through any part of the adjuster, use, at the manufacturer's option, either S5.1.1(b) or, if physically possible, S5.1.1(c).
- (2) For a seat specified in S5.1.1(a)(1) for which it is not physically possible to follow the procedure in S5.1.1(c), use S5.1.1(b).
- (3) For a seat whose center of gravity is in a horizontal plane that is below the seat adjuster, use S5.1.1(c).
- (4) For all other seats whose seat back and seat bench are attached to the vehicle by the same attachments, use S5.1.1(b).

(b) Secure a strut on each side of the seat from a point on the outside of the seat frame in the horizontal plane of the seat's center of gravity to a point on the frame as far forward as possible of the seat anchorages. Between the upper ends of the struts attach a rigid cross-member, in front of the seat back

frame for rearward loading and behind the seat back frame for forward loading. Apply the force specified by S4.2(a) or S4.2(b) horizontally through the rigid cross-member as shown in Figure 1.

(c) Find "cg₁," the center of gravity of the portion of the seat that is above the lowest surface of the seat adjuster. On each side of the seat, secure a strut from a point on the outside of the seat frame in the horizontal plane of cg₁ to a point on the frame as far forward as possible of the seat adjusted position. Between the upper ends of the struts attach a rigid cross-member, in front of the seat back frame for rearward loading and behind the seat back frame for forward loading. Find "cg₂," the center of gravity of the portion of the seat that is below the seat adjuster. Apply a force horizontally through cg₁ equal to 20 times the weight of the portion of the seat represented by cg₁, and simultaneously apply a force horizontally through cg₂ equal to 20 times the weight of the portion of the seat represented by cg₂.

S5.1.2 If the seat back and the seat bench are attached to the vehicle by different attachments, attach to each component a fixture capable of transmitting a force to that component. Apply forces,

in newtons, equal to 20 times the mass of the seat back in kilograms multiplied by 9.8 m/s^2 horizontally through the center of gravity of the seat back, as shown in Figure 2 and apply forces, in newtons, equal to 20 times the mass of the seat bench in kilograms multiplied by 9.8 m/s^2 horizontally through the center of gravity of the seat bench, as shown in Figure 3.

S5.2 Develop the moment specified in S4.2(d) as shown in Figure 4.

S5.3 Apply the forces specified in S4.3.2.1(a) and (b) to a hinged or folding seat as shown in Figure 1 and to a hinged or folding seat back as shown in Figure 5.

S5.4. Determine the center of gravity of a seat or seat component with all cushions and upholstery in place and with the head restraint in its fully extended design position.

10a

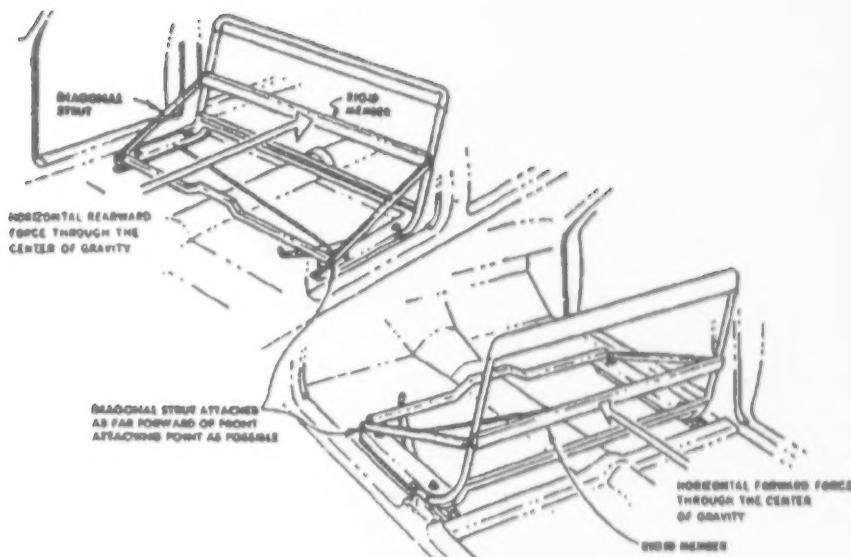


FIGURE 1

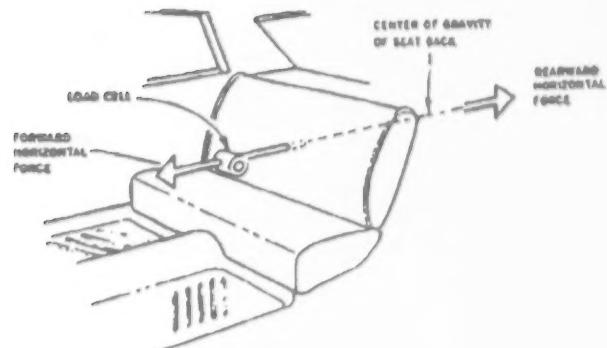


FIGURE 2

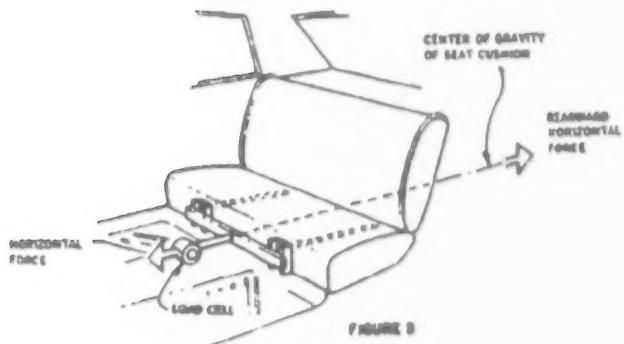


FIGURE 3

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11a

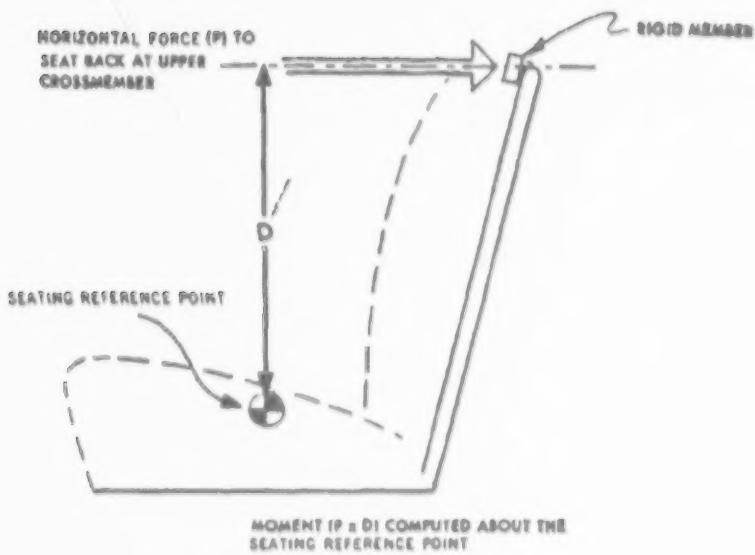


FIGURE 4

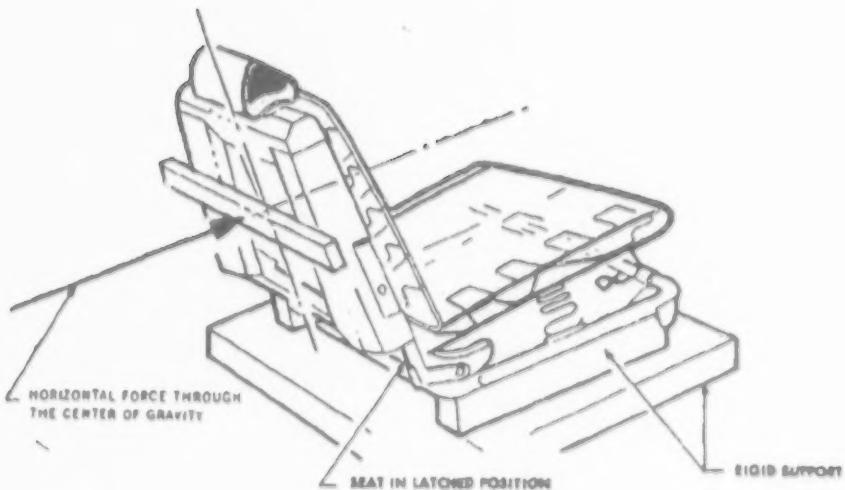


FIGURE 5

[52 FR 7868, March 13, 1987; 53 FR 30434, Aug. 12, 1988; 59 FR 37167, July 21, 1994; 60 FR 13647, March 14, 1995; 63 FR 28935, May 27, 1998; 73 FR 62779, Oct. 21, 2008]

12a

SOURCE: 36 FR 22902, Dec. 2, 1971; 50 FR 21056, June 6, 1985; 51 FR 9456, March 19, 1986; 59 FR 37175, July 21, 1994; 59 FR 38940, Aug. 1, 1994; 60 FR 58524, Nov. 28, 1995; 64 FR 10815, March 5, 1999; 64 FR 47582, Aug. 31, 1999, unless otherwise noted.

AUTHORITY: 49 U.S.C. 322, 30111, 30115, 30166 and 30177; delegation of authority at 49 CFR 1.50.

APPENDIX C

49 U.S.C. § 30102

Title 49: Transportation

CHAPTER 301 – MOTOR VEHICLE SAFETY

Subchapter I – General

§ 30102 – Definitions

(a) General definitions. – In this chapter –

* * *

(9) “motor vehicle safety standard” means a minimum standard for motor vehicle or motor vehicle equipment performance.

APPENDIX D

Tenn. Code Ann. § 29-28-104

Title 49: Remedies and Special Proceedings

**CHAPTER 28 -
PRODUCT LIABILITY ACTIONS**

**§ 29-28-104 - Government standard;
compliance; presumptions**

Compliance by a manufacturer or seller with any federal or state statute or administrative regulation existing at the time a product was manufactured and prescribing standards for design, inspection, testing, manufacture, labeling, warning or instructions for use of a product, shall raise a rebuttable presumption that the product is not in an unreasonably dangerous condition in regard to matters covered by these standards.

APPENDIX E

Tenn. Code Ann. § 39-13-215

Title 39: Criminal Offenses

CHAPTER 13 - OFFENSES AGAINST PERSON

Part 2 - Criminal Homicide

§ 39-13-215 - Reckless homicide

- (a) Reckless homicide is a reckless killing of another.
- (b) Reckless homicide is a Class D felony.

APPENDIX F

IN THE CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

**JEREMY FLAX and RACHEL SPARKMAN,
as the Natural Parents of Joshua Flax, deceased;
RACHEL SPARKMAN, individually, Plaintiffs**

v.

**DAIMLERCHRYSLER CORPORATION,
and LOUIS A. STOCKELL, JR., Defendants**

NO. 02C-1288

DEFENDANT DAIMLERCHRYSLER CORPORATION'S PROPOSED JURY INSTRUCTIONS ON PUNITIVE DAMAGES

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* * *

In determining the appropriate amount of punitive damages, if any, in this case, you may consider only the harm to the plaintiff in this case. Any individuals other than the plaintiff who might claim to have been harmed by DaimlerChrysler have the right to bring their own lawsuit seeking damages for any alleged injuries they may have incurred. Therefore, if you decide to award any punitive damages, your award must be limited to redressing the injuries incurred only by the plaintiff in this lawsuit.*

* * *

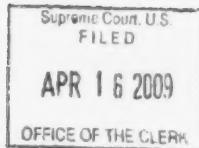
* See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003) ("Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant. . . . Punishment on these bases creates the possibility of multiple punitive damage awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains."); *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. 357, 376-77 (ED. Pa. 1982) ("Each tort committed by the defendant is individual and peculiar to that particular plaintiff who has brought suit. Punitive damages are a recoverable item of relief so long as the conduct exhibited by the defendant with respect to that individual plaintiff can be termed as 'outrageous' and a reckless indifference to the rights of that plaintiff."); See also *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580 (1996); *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634, 639-40 (10th Cir. 1996) ("In figuring harm both actual and potential harm may be considered. But it must be harm to these plaintiffs, not to others."); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967) (Friendly, J.) ("The legal difficulties engendered by claims for punitive

(Continued on following page)

damages on the part of hundreds of plaintiffs are staggering. If all recovered punitive damages in the amount here awarded these would run into tens of millions, as contrasted with the maximum criminal penalty of 'imprisonment for not more than three years, or a fine of not more than \$10,000, or both such imprisonment and fine.' . . . We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill.⁷).

RECORD
AND
BRIEFS

(5)



No. 08-1010

IN THE
Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,

v.

JEREMY FLAX, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Tennessee

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

Respondents' brief in opposition confirms that the decision below warrants review. The Tennessee Supreme Court, in a divided decision, reimposed a \$13 million punitive damage award even though Chrysler's conduct satisfied every objective indicator of reasonableness. Respondents mischaracterize Chrysler's argument as presenting the question whether federal safety standards pre-empt state tort laws, and then attack their fictional construct. Opp. 13-21. But this is not a case about pre-emption. Rather, the question is whether the constitutional "fair notice" principle forbids punishment when a state's punitive damages law is so vague and indeterminate that a defendant cannot know in advance what conduct might subject it to punishment. The Court has noted this issue, see *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 24 n.12 (1991), but has yet to squarely address it. This case offers an excellent opportunity to do so.

Chrysler's petition also demonstrated that certiorari is warranted to resolve the conflicts and confusion in the lower courts over the proper application of the comparable penalties guidepost, which the Tennessee court refused to apply in this case, as well as over the ratio guidepost, which plainly bars a punitive award that is more than five times the substantial compensatory award in this case. Respondents contend that the Tennessee Supreme Court's decision was correct. Opp. 21-26. They are wrong about that, but they cannot and do not dispute the many conflicts in the lower courts over these issues. As the court below noted with regard to the comparable penalties guidepost, "[w]e are unfortunately left with

little guidance" in this area, and "[o]ther courts have experienced similar frustrations." Pet. App. 35a. Review is warranted.

I. REVIEW IS NECESSARY TO CLARIFY THE "FAIR NOTICE" RULE IN THE CONTEXT OF PUNITIVE DAMAGE LIABILITY

The jury punished Chrysler for designing a minivan that exceeded federal strength requirements and was consistent with the design of virtually every other vehicle on the road. Chrysler's petition demonstrated that the Tennessee Supreme Court's decision upholding punitive damages deprived Chrysler of fair notice, and thus violated due process, because it permitted punishment without regard to objective indicators of reasonableness. Pet. 9-16.

Respondents' opposition relies on a fundamental mischaracterization of Chrysler's argument. Respondent contends that Chrysler is arguing that when a manufacturer complies with the Federal Motor Vehicle Safety Standards, punitive damages are barred as a matter of law. *See, e.g.*, Opp. 10, 13. But this is not Chrysler's argument.

Rather, Chrysler's argument is that where, as here, *all* objective indicators of reasonable conduct demonstrate that Chrysler's design decision, even if it could somehow be deemed negligent, was not outside the spectrum of objectively reasonable judgments, Chrysler did not have fair notice that the design could subject it to punishment. To be sure, compliance with federal safety standards is one of the indicators of reasonable conduct and is without question an important benchmark. But it is far from the only one. Compliance with industry custom is

another. In this case, Respondents' expert admitted that Chrysler's design was "average" and "fit in the middle" of all the seat designs on the road. Pet. App. 148a. Another indicator of reasonable conduct is the existence of a genuine debate within the relevant scientific or engineering community. Here too, the record shows that Chrysler's design judgment was reasonable, as there has long been a vigorous debate among engineers over the optimal level of seatback strength. Pet. App. 58a.

Respondents rely heavily on *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). But their contention that *Silkwood* forecloses Chrysler's fair notice argument is misplaced. For one thing, the defendant in *Silkwood* did not comply with all federal standards, as Chrysler did here. See 464 U.S. at 243. Moreover, the defendant in *Silkwood* did not raise a due process challenge and did not make the fair notice argument that Chrysler has raised here; indeed, the Court expressly noted that the constitutionality of the state statute was not at issue. *Id.* at 247. *Silkwood* simply has nothing to do with due process limits on punitive damage awards; it was a case about federal pre-emption based on regulations promulgated by the Nuclear Regulatory Commission. Here, in contrast, Chrysler is not arguing that the Federal Motor Vehicle Safety Standards *pre-empt* state causes of action; rather, it is that due process requires that punitive damage awards be based on an objective assessment of the defendant's conduct, and the federal standards are one relevant benchmark.¹

¹ The Restatement and the cases Respondents cite pertain to a state's determination of liability for compensatory damages, not the imposition of punitive damages. See RESTATEMENT

Respondents also contend that Tennessee enjoys “sovereign authority” to determine the relevance of a manufacturer’s compliance with federal safety standards for purposes of its punitive damage laws. Opp. 14–18. But this is true only to a point. A state’s interpretation of its punitive damage law must be exercised within constitutional constraints. And where, as here, a state interprets its punitive damage statute to authorize punishment without regard to objective indicators of reasonableness, it violates the Due Process Clause. Respondents’ suggestion that state punitive damage regimes are immune from constitutional review on a “sovereign authority” theory is rebutted by virtually every major punitive damages decision from this Court. See, e.g., *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433 (2001) (“Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion.”).

Respondents concede that the Tennessee recklessness standard is indistinguishable from the recklessness standard at issue in *Safeco Insurance Company of America v. Burr*, 127 S. Ct. 2201 (2007). Opp. 16–17 n.4. In *Safeco*, this Court concluded that the defendant’s interpretation of its legal duties, “albeit erroneous, was not objectively unreasonable” and emphasized that “[i]t is [the] high risk of harm, objectively assessed, that is the essence of reckless-

[Footnote continued from previous page]

(THIRD) OF TORTS: PRODS. LIAB. § 4 (1998); *Surles v. Greyhound Lines, Inc.*, 474 F.3d 288, 300–01 (6th Cir. 2007); *Brown v. Stone Mfg. Co.*, 660 F. Supp. 454, 459 (S.D. Miss. 1986).

ness at common law." *Id.* at 2215. Respondents attempt to distinguish *Safeco* on the basis that it was not a design defect case. Opp. 16–17 n.4. But *Safeco* cannot be read so narrowly. *Safeco* recognized that, at common law, recklessness must be evaluated by reference to objective indicators, such as "agency guidance." *Id.* at 2216 n.20. That was precisely the approach rejected by the Tennessee Supreme Court in this case. Just as in *Honda Motor Co. Ltd. v. Oberg*, 512 U.S. 415, 430 (1994), where this Court held Oregon's punitive damage scheme unconstitutional because it departed from common-law practice, Tennessee's scheme (as interpreted by its highest court in this case) violates due process because it departs from common-law practice by depriving defendants of a longstanding and critical common-law protection: fair notice of the conduct that will subject them to punishment.

Respondents contend that Chrysler's compliance with all objective indicators of reasonableness is immaterial because Chrysler was "aware" of the alleged defect in the minivan seat. Opp. 18–19. But the basis for this assertion is the testimony of Paul Sheridan, who is not an engineer but a former marketing employee. The fact that one of Chrysler's employees allegedly urged a different approach to seat design cannot provide the constitutionally mandated fair notice of what the law requires, particularly where the employee's approach differed from Chrysler's seat design engineers, the conclusions of federal safety regulators, other motor vehicle manufacturers, and engineers and safety experts throughout the industry. The question presented by this case is whether Chrysler's conduct was objectively reason-

able, and Mr. Sheridan's personal disagreement with Chrysler says nothing on this score.²

Respondents repeatedly attack the federal seat-back strength standard as a "minimum" standard. Opp. 13. But Chrysler did more than just satisfy the standard—it exceeded it by more than three times. Pet. App. 59a.

Likewise, Respondents' contention that Chrysler acted recklessly because it knew the seatback would yield rearward and could cause injury, Opp. 19–20, grossly mischaracterizes the design decision at issue. Seatback design requires striking a balance between competing goals. *See* App. 58a. While Respondents argue that minivan seats should be very stiff so as to afford greater protection to rearseat occupants, their own expert Burton admitted that "the stiffer the seat is, the more the risk of something bad happening." 11/9 Tr. 211–12. Likewise, their expert Saczalski said that "we don't want a totally rigid seat" so "the key here is to find the seat that has the right amount" of yield. 11/8 Tr. 216. Respondents' claim that Chrysler "knew" of the risk allegedly posed by its design thus misses the point. To be sure, Chrysler recognized the risk, but recognizing a risk is not wrongful conduct; indeed, it is what we want manufacturers to do. Chrysler then made an objectively reasonable judgment as to how best to *manage* that

² In fact, the Tenth Circuit has determined that Mr. Sheridan is "wholly unqualified" to testify on seat back failure FMVSS 207, or anything related to controlled yield." *Gardner v. Chrysler Corp.*, 89 F.3d 729, 737 (10th Cir. 1996). And yet the Tennessee Supreme Court held that Sheridan's testimony could override Chrysler's compliance with all objective indicators of reasonableness.

risk, without creating *greater* risks for its customers by using a seat design that did not yield enough.

The divided Tennessee Supreme Court's decision provides no way for a manufacturer to ensure during the design of a product that its conduct complies with what a jury may determine post hoc was required. *See PLAC Amicus Br.* 17. A manufacturer that complies with every objective indicator of lawfulness may still be found to have violated the law if a single engineer it employs disagrees with its conclusion. This is especially problematic in designs, like the one at issue in this case, involving competing risks because the design must obtain an optimal balancing of those risks, and making the product safer in one respect may have the effect of making it less safe in another respect. Tennessee's arbitrary and standardless approach violates the Due Process Clause and warrants review by this Court.

II. REVIEW IS NECESSARY TO RESOLVE THE CONFUSION OVER THE COMPA- RABLE PENALTIES AND RATIO GUIDEPOSTS

Chrysler's petition identified two questions that have split the lower courts: whether a court may simply decline to apply the comparable penalties guidepost, as the Tennessee Supreme Court did here; and whether a 1:1 ratio between compensatory and punitive damages is the constitutional maximum where the compensatory award is substantial, as it is here. Respondents have little to say in response, and devote their opposition to arguing that the result below was *correct*. Tellingly, they do not dispute the existence of circuit splits over the questions presented, thus implicitly conceding that certiorari is warranted. *See Danforth v. Minnesota*, 128 S. Ct.

1029, 1034 (2008) (granting petition to resolve confusion even though it was “clear” that lower court was correct).

A. In what has become an increasingly common refrain in the lower courts, the Tennessee Supreme Court stated that it did not know how to apply the comparable penalties guidepost. It surveyed the caselaw and reported that many courts are “experienc[ing] . . . frustrations when attempting to apply the third guidepost, and some have chosen to ignore the third guidepost altogether.” Pet. App. 35a (citing cases). The court ultimately threw up its hands, reasoning that while the third guidepost “seems to compel a dramatically different conclusion” than the one the court ultimately reached, the problem could be avoided by simply not applying the guidepost in this case. Pet. App. 33a.

Respondents insist that refusing to apply the comparable penalties guidepost when it produces an unwelcome result represents a “faithful[] and meticulous[]” application of “this Court’s teachings on punitive damages.” Opp. 21. Nowhere, however, do Respondents deny the point that the Tennessee Supreme Court made—that the lower courts are confused and divided over how to apply the comparable penalties guidepost. Chrysler’s petition canvassed the caselaw and demonstrated the many different and conflicting approaches the lower courts have taken to the comparable penalties guidepost. Pet. 20–25. Respondents are utterly silent in response. Chrysler’s showing that this is an issue warranting review stands unrebutted.

Respondents’ arguments on the merits fare no better. They claim that Chrysler seeks to “elevate the third guidepost into a conclusive and overriding

factor.” Opp. 22. But that is not Chrysler’s argument. Chrysler’s position is merely that the comparable penalties guidepost cannot be disregarded, as the Tennessee Supreme Court did here. To be sure, there may be cases where the comparable penalties guidepost suggests a different result than the reprehensibility or ratio guideposts. But that is no basis for declining to apply it.

Respondents assert that requiring application of the comparable penalties guidepost would cause parties to “inundate the court with analogous legislative judgments.” Opp. 22. But the consideration of “analogous legislative judgments” is precisely what the Constitution requires. *See State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (due process requires comparison “between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases”).

Respondents contend that the Tennessee Supreme Court correctly determined that the most relevant legislative penalties were inapplicable because they were not large enough to punish or deter the alleged wrongful conduct. Opp. 23. But the purpose of the comparable penalties guidepost is to ensure that the defendant had “fair notice” of the amount of the sanction that could be imposed for the conduct in question. The court’s view that a higher penalty was necessary to achieve policy goals of punishment and deterrence is irrelevant to the “fair notice” determination. Permitting a court to ignore the legislatively authorized penalties for comparable conduct in favor of its own subjective judgment of the size of the penalty necessary to achieve optimal punishment and deterrence drains the comparable penalties guidepost of any constraining force.

B. The Tennessee Supreme Court also misapplied the ratio guidepost in a way that conflicts with this Court's guidance as well as with decisions from other courts. Even though the compensatory damage award was undeniably "substantial," the court nonetheless upheld a punitive damage award that was more than five times the compensatory award. This holding cannot be reconciled with *State Farm*, where this Court strongly indicated that where compensatory damages are "substantial," a 1:1 ratio is the maximum the Constitution permits, nor with *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008), which reduced a punitive damage award under federal maritime common law to achieve a 1:1 ratio. Moreover, it conflicts with the approaches taken by the Third, Sixth and Eighth Circuits, all of which have followed this Court's guidance and properly remitted punitive damage awards where the compensatory award was substantial. Pet. 26–28.

Here too, Respondents do not dispute Chrysler's showing that this is an issue that has deeply divided the lower courts. Rather, the only response Respondents offer is that this Court to date has declined to impose a bright-line ratio in punitive damage cases. Opp. 24–25. Certainly if the Court were inclined to impose a clear rule, this case presents an excellent vehicle for doing so. A clear rule would bring relief to an area of law that continues to be plagued by inconsistency and by irrational and arbitrary punishments.

But even if the Court declines to recognize a bright-line rule, a decision clarifying its statements in *State Farm* and *Exxon* would help resolve the confusion in the lower courts. As Chrysler has shown, the courts have interpreted the meaning of "substantial" in different and conflicting ways, Pet. 23–28,

and these conflicts—which Respondents do not dispute—merit this Court’s review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 08-1010

IN THE
Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,
Petitioner,

v.

JEREMY FLAX, ET AL.,
Respondents.

**On Petition for Writ of Certiorari to the
Supreme Court of Tennessee**

**BRIEF OF THE PRODUCT LIABILITY ADVISORY
COUNSEL, INC. AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

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BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit association with 108 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of product manufacturers. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in every major facet of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 850 briefs as *amicus curiae*, in this Court and the state and federal courts, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as an Appendix.¹

As part of the regular product-design process, PLAC's corporate members must routinely analyze

¹ Pursuant to S. Ct. R. 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's Office.

and resolve questions about safety. PLAC members who manufacture products with potential risks of significant physical injury — including pharmaceuticals, medical devices, pesticides, foodstuffs, chemicals, appliances, power tools, and automobiles — have a particular interest in the legal ramifications of product design decisions.

It is therefore particularly important to PLAC's members that the law provide clear guidance on how manufacturers can avoid the imposition of punitive liability.

INTRODUCTION AND SUMMARY OF ARGUMENT

When designing a product, manufacturers are expected to weigh the utility of a product's design features against the risk,² but a manufacturer whose design process includes such a calculus can later be charged with punitive damages for “knowingly” designing a product that poses grave risks to consumers. The more transparent and comprehensive that manufacturer's design analysis is, the more the manufacturer opens itself up to such a charge. When the product being manufactured carries inherent risks, such as the automobile at issue in this case, experts will invariably debate the relative benefits and risks of the proposed features. Manufacturers are routinely forced to make decisions in the face of imperfect information and conflicting predictions. When a manufacturer's “knowledge” that its product poses known risks to consumers is deemed sufficient to sustain a punitive award, the

² Restatement (Third) of Torts, Product Liability § 2(b) (1998).

common law gives no guidance as to how a manufacturer can avoid the risk of punitive liability.

Absent objective indicators of reasonableness, responsible manufacturers can never know in advance whether their design decisions will subject them to punishment and post hoc second guessing. Under state law, as applied in this case, the manufacturer was subjected to punishment despite the fact that its conduct conformed with all objective benchmarks of proper and lawful design. Its design exceeded the specific and detailed regulatory requirements governing seat strength (49 C.F.R. § 571.207) and conformed with all industry standards. App. 18a. Even further, the manufacturer presented evidence at trial that the alternative design proposed by the Plaintiffs would provide less protection to occupants in other types of accidents. App. 26a. Thus, if the manufacturer had used that alternative design, it would have "knowingly" caused injuries in other types of accidents and — under the theory advanced by the Plaintiffs here — would have been subject to punitive damages in cases arising from other accidents.

At most, Petitioner's design was subject to reasonable debate or disagreement. That a plaintiff can find an expert to attack the design long after the fact does not give the manufacturer "fair notice * * * of the conduct that will subject [it] to punishment." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996). Rather, the imposition of punitive damages in such a case "mak[es] the law so arbitrary that [manufacturers] will be unable to avoid punishment based solely upon bias or whim." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (quoting *Pacific Mut. Life Ins. Co. v.*

Haslip, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting)).

In recent years, this Court has placed much-needed constraints on excessive common-law punitive damages awards. However, it has not articulated the precise constraints that due process imposes on punitive liability.

The arbitrary and standardless imposition of punitive damages is far too common in product liability cases. By their very nature, such cases pose a great risk of hindsight bias, jury sympathy for seriously injured plaintiffs, and of juror bias against large corporations. A manufacturer's intention to design a product that has inherent risks can easily be confused with intent to cause harm. Manufacturers who make good faith design decisions that balance the risks of injury inherent in myriad circumstances, and whose products comply with detailed regulatory standards and meet and even exceed all other published safety standards, should not be stigmatized by the quasi-criminal imposition of punitive damages. Infliction of punishment in such circumstances deprives the manufacturer of due process because the manufacturer does not have the fair notice required by due process — i.e., notice sufficient to permit it to tailor its conduct to comply with the law and thereby avoid punishment altogether.

ARGUMENT

I. Identifying the Due Process Constraints On An *Award* of Punitive Damages Is An Issue of Great Significance Because of the Quasi-Criminal Nature of Punitive Damages Awards.

It is vitally important for this Court to clarify the threshold for the imposition of punitive damages under the Due Process Clause. The Due Process Clause prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. *State Farm*, 538 U.S. at 416; *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433 (2001). Punitive damages awards "serve the same purpose as criminal penalties." *State Farm*, 538 U.S. at 417. However, because civil defendants are not accorded the protections afforded criminal defendants, "punitive damages pose an acute danger of arbitrary deprivation of property." *Id.* (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994)).

Much of the recent constitutional jurisprudence has focused on the *amount* of such awards. This case provides an opportunity to clarify the due process standards applicable to the *imposition* of punitive damages in the first place. Due process constraints apply both to the imposition of punishment *and* its excessiveness. Indeed, it is no less important that citizens have fair notice of the conduct that will expose them to punishment than it is that they know how harsh the punishment may be. See *Haslip*, 499 U.S. at 24 n. 12 (rejecting vagueness challenge to standards for determining *amount* of punitive damages because "[d]ecisions about the

appropriate consequences of violating a law are significantly different from decisions as to whether a violation has occurred").

The indiscriminate imposition of punitive damages has "a devastating potential for harm." *State Farm*, 538 U.S. at 417 (quoting *Haslip*, 499 U.S. at 42 (O'Connor, J., dissenting)). A verdict or judgment of malice, intentional misconduct, or recklessness carries a stigma qualitatively greater than, and legally distinct from, a judgment for compensatory damages based on strict liability or even negligence. "[T]here is a stigma attached to an award of punitive damages that does not accompany a purely compensatory award. The punitive character of punitive damages means that there is more than just money at stake. This factor militates in favor of strong procedural safeguards." *Haslip*, 499 U.S. at 54 (O'Connor, J., dissenting); see also *Masaki v. General Motors Corp.*, 71 Haw. 1, 16, 780 P.2d 566, 575 (1989) (punitive damages "can stigmatize the defendant in much the same way as a criminal conviction" and therefore "can be onerous when loosely assessed"); Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 280-281 (1983).

The consequences to a manufacturer from a million-dollar verdict for punitive damages are qualitatively different from the consequences of a compensatory award for the same amount. In the product-liability context, an award of punitive damages can give rise to "publicity about litigation that may damage the company's reputation or trigger additional lawsuits, reactions of consumers that could reduce product demand, and reactions of safety regulators such as investigations, product

recalls, or stricter regulations." Steven Garber, *Punitive Damages and Deterrence of Efficiency-Promoting Analysis: A Problem Without a Solution?*, 52 STAN. L. REV. 1809, 1814 (2000).

Such consequences would be serious enough even if the standard for punitive liability were clear and unambiguous. However, given the absence of clear and objective standards under which such damages are imposed (see Section II, *infra*), and the inability to avoid the risk of arbitrary imposition of such liability even if a manufacturer employs a conscientious and responsible design process (see Section III, *infra*), it is crucial that this Court provide guidance to the lower courts in order to "cabin the jury's discretionary authority" and thereby to limit the imposition of "arbitrary punishments" on product manufacturers. *Philip Morris USA v. Williams*, 549 U.S. 346, 352 (2007).

II. The Court Should Grant Review to Make Clear That the Due Process Clause Requires Objective Criteria for the Imposition of Punitive Damages.

"Unless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system may deprive a defendant of 'fair notice * * * of the severity of the penalty that a State may impose' and 'threaten 'arbitrary punishments,' i.e., punishments that reflect not an 'application of law' but 'a decision maker's caprice.'" *Philip Morris*, 549 U.S. at 352 (citations omitted). Therefore, "the Constitution imposes certain limits, in respect *both to procedures for awarding punitive damages and to amounts forbidden as 'grossly excessive.'*" *Id.* at 353 (citations omitted, emphasis

supplied).

A defendant's due process rights are violated by the imposition of *punishment* without adequate notice of the prohibited conduct, just as they would be violated by the imposition of an *excessive punitive award*. *Gore*, 517 U.S. at 574 (“[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice *** of the conduct that will subject him to punishment”); *Giaccio v. State of Pennsylvania*, 382 U.S. 399, 402-403 (1966) (“a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits”); *see also Sorich v. United States*, 555 U.S. ---, No. 08-410, 2009 WL 425807 at *3, 77 USLW 3228 (Feb. 23, 2009) (Scalia, J., dissenting from denial of cert.) (“this Court has long recognized the ‘basic principle that a criminal statute must give fair warning of the conduct that makes it a crime.’ *** It is simply not fair to prosecute someone for a crime that has not been defined until the judicial decision that sends him to jail” (citing *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964))).

These principles also apply to laws imposing civil liability which are punitive in nature. *See, e.g., Village of Hoffman Estates v. Flipside Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (strict scrutiny for statute that imposed quasi-criminal penalties); *Champlin Ref. Co. v. Corp. Comm'n*, 286 U.S. 210, 241 (1932) (penalty statute unconstitutionally vague where it was designed not to remedy a violation but “to inflict punishment”); *A.B. Small Co. v. American Sugar Ref. Co.*, 267 U.S. 233 (1925) (statute unconstitutionally vague in civil case); *S.W. Tel. &*

Tel. Co. v. Danaher, 238 U.S. 482 (1915) (\$6,300 civil penalty violated due process).

The Due Process Clause requires clear, ascertainable standards for all essential steps leading to the imposition of punitive damages. *See Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. 71, 88 (1988) (“[the Mississippi Supreme Court’s] grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process.”) (O’Connor, J., concurring); *see also Philip Morris*, 549 U.S. at 354 (“to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation”).

“[T]his Court has often recognized ‘the basic principle that a criminal statute must give fair warning of the conduct that makes it a crime.’” *Rogers v. Tennessee*, 532 U.S. 451, 457 (2001), quoting *Bouie*, 378 U.S. at 350; *See also, Connally v. General Constr. Co.*, 269 U.S. 385 (1926) (penal statute creating an eight-hour day for state workers and providing for wages “not less than the current rate of per diem in the locality where the work is performed” is vague for uncertainty); *U.S. v. Capitol Traction Co.*, 34 App. D.C. 592 (1910) (penal statute making it an offense for a street railway company to run insufficient cars to accommodate passengers “without overcrowding” is void for uncertainty).

It follows that due process requires fair notice to defendants sufficient to enable them to avoid conduct that will expose them to *any* punishment. It is not enough that a defendant is found to be “reckless” under a “standard” formulated and applied only after the fact by a jury convened solely for a single case. Rather, due process requires that

“recklessness” for purposes of imposing punitive damage liability must be tethered to concrete, knowable standards, not ad hoc and retrospective balancing.

The Due Process Clause forbids criminal convictions for conduct that is not defined with sufficient specificity to permit a defendant to know what conduct is prohibited. For example, in *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921), this Court reviewed a federal anti-profiteering statute enacted as part of the price-control system established during World War I that made it “unlawful for any person willfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessities.” This Court held that the Fifth and Sixth Amendments require an ascertainable standard of guilt that is adequate to inform those accused of the nature and cause of the accusation against them. *Id.* This Court further held that the statute in question “forbids no specific or definite act,” and therefore impermissibly left it to the judge and jury to decide what was prohibited. *Id.* *L. Cohen Grocery* thus stands for the proposition that it is not enough that a defendant is found to be “reckless” for purposes of imposing punitive damages — it is necessary that the defendant recklessly engaged in a defined, prohibited act.

Due process likewise precludes the imposition of punishment whenever the defendant reasonably could have concluded that its conduct was lawful. See generally *Colautti v. Franklin*, 439 U.S. 379 (1979) (statute that predicated criminal responsibility on a “complex medical judgment about which experts can — and do — disagree” was

unconstitutionally vague); *Connally*, 269 U.S. at 392 (law imposing criminal penalties “should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another”) (citation omitted); *S.W. Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490 (1915). The same principles apply to punishment meted out in a civil proceeding. The fact that punitive damages are “quasi-criminal” underscores the need for due process protection against their arbitrary and standardless imposition. *Cooper Industries*, 532 U.S. at 432-433 (“Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion”). Although punitive damages awards “serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding. This increases our concerns over the imprecise manner in which punitive damages systems are administered.” *State Farm*, 538 U.S. at 417.

The due process standard, which protects all citizens from punishment based on vaguely defined offenses, is functionally identical to the qualified immunity standard, which protects public officials from civil liability based on legal obligations that are not “clearly established.” *United States v. Lanier*, 520 U.S. 259, 270-271 (1997). The qualified immunity test for public officers is “simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals

have traditionally possessed in the face of vague criminal statutes." *Id.* Officials are entitled to qualified immunity as long as their conduct is "objectively reasonable," *i.e.*, as long as reasonable officials could conclude that the conduct at issue was lawful. *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (immunity available if officers act in an "objectively reasonable manner," defendants "will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that the conduct was lawful"); *accord, e.g., Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (under "settled law," officers are entitled to immunity "if a reasonable officer could have believed" that his or her conduct was lawful); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) ("The relevant question in this case, for example, is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's [conduct] to be lawful"). Accordingly, "if officers of reasonable competence could disagree on [the matter at] issue, immunity should be recognized." *Malley*, 475 U.S. at 341; *see also Anderson*, 483 U.S. at 641 (due process vagueness test is equivalent to the test for qualified immunity, and public officials are entitled to qualified immunity if "a reasonable officer could have believed the [conduct] to be lawful").

"[T]he point of due process — of the law in general — is to allow citizens to order their behavior. A State can have no legitimate interest in deliberately making the law so arbitrary that citizens will be unable to avoid punishment based solely upon bias or whim." *State Farm*, 538 U.S. at 418.

This case exemplifies the need for this Court to clarify the constitutional threshold that state law must meet before imposing punitive damages upon a manufacturer. After all, what could any conscientious automobile manufacturer have done in order to avoid the risk of punitive damages in the situation that existed for Petitioner in this case? It could look to the applicable Federal Motor Vehicle Safety Standard in effect at the time of manufacture, but Petitioner's design already exceeded that standard. It could look to industry standards and practices, but its design already conformed to such practices. It could make the seats even less likely to yield than those of other manufacturers, but increasing the seat's stiffness and strength would increase the frequency and severity of injuries in other types of collisions, thereby trading the potential injuries of one class of accident victims for those of others. In short, no objective criterion to which the Petitioner could have turned would avoid exposure to punitive liability under the Tennessee punitive damages regime.

Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition. *Gore*, 517 U.S. at 568. But just as one state "may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States," punitive liability should not be imposed on a defendant whose conduct was lawfully in compliance with a detailed, applicable federal regulation. *Id.* at 572-573 ("Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents. Nor may

Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions") (citations and footnote omitted).³

The lower court also ignored the third guidepost identified in *Gore* for judging the excessiveness of a punitive damages award. The third guidepost is the legislative sanction for the conduct for which punitive damages are awarded. *Gore* requires that the reviewing court give "substantial deference" to this sanction. 517 U.S. at 583. Because Petitioner's seat design complied with and substantially exceeded the federal regulatory standard for seat back strength, the largest permissible penalty that could have been imposed for such conduct was "zero." The lower court should have considered the lack of legislative or administrative sanctions as an important reason to reject punitive damages altogether. Instead, the lower court noted that courts have experienced frustration in applying the three guideposts when the results the guideposts suggest are not aligned and, in effect, ignored this guidepost altogether. App. 35a.

Moreover, even had Petitioner's conduct ultimately been found unlawful, punishment should not have been imposed if its conduct was not

³ See, e.g., W. Page Keeton et al., *Prosser and Keeton on the Law of Torts*, § 36 n. 41 at 233 (5th ed. 1984) ("[I]n most contexts. . .compliance with a statutory standard should bar liability for punitive damages"); *Stone Man, Inc. v. Green*, 263 Ga. 470, 471-472, 435 S.E. 2d 205, 206 (1993) ("such [statutory] compliance does tend to show that there is no clear and convincing evidence of willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences." (citation omitted)).

objectively unreasonable. *Safeco Ins. Co. of America v. Burr*, 127 S. Ct. 2201, 2215 (2007). *Safeco* involved the Fair Credit Reporting Act (15 U.S.C. § 1681a *et seq.* (FCRA)), which provides, among other things, that “willful” failures to comply with the statute may result in an award of punitive damages. The term “willful” encompasses not only “knowing” violations but also “reckless disregard of statutory duty.” *Safeco*, 127 S. Ct. at 2208. The long-established, common law meaning of the term “recklessness” necessarily requires reference to *objective* standards: “[w]hile ‘the term recklessness is not self-defining,’ the common law has generally understood it in the sphere of civil liability as *conduct violating an objective standard*: action entailing ‘an unjustifiably high risk of harm that is either known or so obvious that it should be known.’” *Id.* at 2215 (emphasis added; citation and footnote omitted.)

While the defendant in *Safeco* acted intentionally in violating the FCRA, the defendant had a “foundation in the statutory text” for its belief that its conduct was lawful which, although erroneous “was not objectively unreasonable” so that the defendant did not act “willfully” or with “reckless disregard.” *Id.* at 2215-22. “Where *** the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation, it would defy history and current thinking to treat a defendant who merely adopts one such interpretation as a knowing or reckless violator.” *Id.* at 2216 n. 20. By analogy to the cases establishing qualified immunity, the Court considered whether the defendant’s action was reasonable in light of legal rules that were “clearly

established" at the time. *Id.* at 2216. In the absence of authoritative guidance from the governing agency (the FTC) and no decision from the court of appeals, the Court held that Safeco's decision was not objectively unreasonable.

This Court has invalidated civil sanctions, as a matter of procedural due process, when state legislations "imposed a significant penalty on a common carrier which lacked the means of determining the legality of its actions before the penalty was imposed." *Gore*, 517 U.S. at 601 (citing *Danaher*, 238 U.S. at 489-491). Similarly the reasoning in *Safeco* is constitutionally based.

Safeco's violation of FCRA could not support the imposition of punitive damages because its actions were based on a reasonable but erroneous interpretation of the statute. In the present case, Petitioner's design did not violate the applicable regulation at all; its actions were held punishable even though Petitioner exceeded the applicable Federal Motor Vehicle Safety Standard, promulgated pursuant to 49 U.S.C. §§ 30301 *et seq.*⁴; even though it complied with industry custom and relied on expert opinion; and even though it would increase the risk of injury in other kinds of collisions if it made the seats less likely to yield.

In short, there was no evidence that Petitioner violated any objective standard concerning how seats should be designed. The extent by which a manufacturer ought to exceed the regulatory standard to achieve optimum safety appears to have been a subject on which design engineers acting

⁴ Federal Motor Vehicle Safety Standard (FMVSS) 207, 49 C.F.R. § 571.207. See App. 18a.

in good faith would — and did — disagree. Consequently, Petitioner had no advance notice of the conduct that would expose it to punishment. Absent violation of a clearly established and objective standard, the Due Process Clause decisions forbid hindsight punishment. Moreover, the imposition of punitive damages on a manufacturer under these circumstances has no salutary, deterrent effect because the manufacturer is unable to determine what it must do to avoid the punishment prospectively.

However a manufacturer's choice may be judged for purposes of *compensatory* damages, it should not give rise to *punitive* damages when neither expert engineers, nor designers, nor federal regulators at the time had reached a general consensus on a different course than that which the manufacturer took. In this situation, Petitioner could reasonably believe that its conduct was lawful, and Petitioner's "wrong" was not "clearly established" before punishment. See *Lanier*, 520 U.S. at 270-271.

III. Product Liability Lawsuits Pose a Significant and Persistent Risk of Arbitrary and Standardless Imposition of Punitive Damages.

Product liability cases pose particularly significant and persistent risks of the arbitrary imposition of punitive damages. There are a variety of reasons for this. First, such cases frequently involve catastrophic injury or death. Second, many products, no matter how well designed, carry unavoidable risks. Third, the design process necessarily involves attempts to identify risks and

balance them against other risks and against the utility of the product. These unique aspects of product liability cases make manufacturers particularly susceptible to punitive liability by juries that are exhorted to conflate intent to design a product in a particular way with intent to injure.

The risk of physical injury is inherent in the manufacture, sale and use of many products. Because of their size and mobility, motor vehicles are, by their very nature, capable of colliding violently with other vehicles, objects, and pedestrians. A life-saving vaccine may protect millions of people yet pose a risk of known, serious side effects to a few. Butter may make popcorn and toast delicious but increase the levels of cholesterol and even the risk of death. For many kinds of products, some injuries are certain to occur, no matter how well the product is designed and manufactured.

In essence, products are frequently designed — carefully but intentionally — with known risks to consumers. Design defect cases inevitably raise “conscious design choice[s]” * * * implicat[ing] a manufacturer’s decisionmaking process concerning risk-utility”; “[u]nlike the standard negligence case of yesteryear, the modern products liability case comes with ‘intent’ built in.” Aaron D. Twerski, *Punitive Damages: Through the Five Prisms*, 39 VILL. L. REV. 353, 356 (1994). The task of a conscientious manufacturer is to strike a reasonable balance between safety and a host of other considerations, including “marketability, appearance, ease of operation, durability, freedom from maintenance or repair, ease of manufacture, and economics of materials and labor.” Richard C. Ausness,

Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation, 74 KY. L.J. 1, 88-89 (1985). See also David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 22-26 (1982).

A manufacturer's weighing of uncertain risks against uncertain benefits requires it to decide prospectively. A jury, by contrast, decides after the fact, with full knowledge of the outcome, and with the victim, or the victim's family, in the courtroom. The manufacturer (and the government regulator) must consider the *overall* safety and utility of the product for *all* users, whereas the plaintiff asks the jury to focus on the *specific* feature or condition that gives rise to a *specific* plaintiff's injury.⁵

Tort law requires manufacturers to make difficult choices in balancing these factors in making design and warnings decisions.⁶ When this "built in" intentionality is imported into a punitive damages analysis, however, it creates the risk that any attempt by the manufacturer to "think about risks in

⁵ Comments from the Third Restatement may be instructive on this point. See, e.g., Restatement (Third) of Torts, Products Liability § 2 cmt. f ("When evaluating the reasonableness of a design alternative, the overall safety of the product must be considered. It is not sufficient that the alternative design would have reduced or prevented the harm suffered by the plaintiff if it would also have introduced into the product dangers of equal or greater magnitude").

⁶ See W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L.J. 286, 299-310 (1998), for a discussion of the complexities affecting corporate decisionmaking as to uncertain safety risks, together with specific examples of situations in which such decisions may be made.

a systematic manner and to undertake [cost-benefit] calculations to ensure that there is appropriate risk balancing that is sufficiently protective" of all interests will be seen, not as a socially responsible aspect of product design, but as egregious misconduct justifying severe punishment. W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547, 550 (2000).

Far from encouraging an open and thorough consideration of product safety, the resulting punitive awards will deter such socially responsible behavior or, at least, deter manufacturers from conducting full-fledged and transparent cost-benefit analyses. See, e.g., Garber, *Punitive Damages and Deterrence of Efficiency-Promoting Analysis*, 52 STAN. L. REV. at 1814 ("[T]he perceived likelihood and potential costs associated with punitive damages for performing risk or benefit-cost analyses can be large enough to attract attention by corporate decision makers and deter them from doing such analyses."). In the present case, for example, the evidence that Petitioner believed that the applicable Federal Motor Vehicle Safety Standard was inadequate — and its consequent decision to design a seat that "drastically exceeded" that standard — is indicative of a responsible design process, not one that deserves punishment.

Moreover, product liability cases inescapably present the facts through the lens of hindsight, with a tragically injured plaintiff on the one hand, and a manufacturer, likely a large corporation, on the other. The jury can easily be provoked to a state of outrage that leads it to award punitive damages regardless of the actual culpability of the manufacturer's conduct or the actual need for

punishment and deterrence. As Judge Easterbrook has explained:

The *ex post* perspective of litigation exerts a hydraulic force that distorts judgment. Engineers design [complex products] to minimize the sum of construction, operation, and injury costs. ***

Come the lawsuit, however, the [plaintiff] injured by [the product] presents himself as a person, not a probability. Jurors see today's injury; persons who would be injured [by an alternative design] are invisible. Although witnesses may talk about them, they are spectral figures, insubstantial compared to the injured plaintiff, who appears in the flesh. *** [N]o matter how conscientious jurors may be, there is a bias in the system. *Ex post* claims are overvalued and technical arguments discounted in the process of litigation. And the claims of crippled neighbors receive more weight than do potential injuries to be felt by [consumers] (and stockholders) in other states.

Carroll v. Otis Elevator Co., 896 F.2d 210, 216 (7th Cir. 1990) (Easterbrook, J., concurring) (citation omitted); see also W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. LEGAL STUD. 107, 116 (2001) (in the jury's mind, a manufacturer's "superior *ex ante* risk judgments may be outweighed by the *ex post* reality of the accident victim"); Owen, *Problems in Assessing Punitive*

Damages Against Manufacturers of Defective Products, 49 U. CHI. L. REV. at 25 (adequate standards for punitive liability necessary to "ensure that the necessarily deliberate nature of a manufacturer's decision making will not be twisted artfully and unfairly into an appearance of conscious wrongdoing").

The lower courts therefore need guidance to ensure that state law requires "proper standards that will cabin the jury's discretionary authority" and to afford the defendant fair notice of the conduct that may subject it to punishment. *Philip Morris, supra*, 549 U.S. at 352. As it presently stands, the common-law punitive damages formulation, as illustrated by the Tennessee Supreme Court's decision in this case, cannot provide fair notice of the conduct which will subject a manufacturer to punishment.

CONCLUSION

For the reasons set forth above, *amicus curiae* PLAC respectfully requests that the Court grant a writ of certiorari to identify and apply the appropriate constraints that due process requires.

Respectfully submitted,

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APPENDIX
Corporate Members of the
Product Liability Advisory Council
as of 3/6/2009

Total: 108

3M
A.O. Smith Corporation
ACCO Brands Corporation
Altec Industries
Altria Client Services Inc.
American Suzuki Motor Corporation
Andersen Corporation
Anheuser-Busch Companies
Arai Helmet, Ltd.
Astec Industries
BASF Corporation
Bayer Corporation
Beretta U.S.A. Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc.
Briggs & Stratton Corporation
Brown-Forman Corporation
Caterpillar Inc.
Chrysler LLC
Continental Tire North America, Inc.
Cooper Tire and Rubber Company
Crown Equipment Corporation

Daimler Trucks North America LLC
E.I. DuPont De Nemours and Company
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Estee Lauder Companies
Exxon Mobil Corporation
Ford Motor Company
Genentech, Inc.
General Electric Company
GlaxoSmithKline
Great Dane Limited Partnership
Harley-Davidson Motor Company
Hawker Beechcraft Corporation
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works, Inc.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Jarden Corporation
Johnson & Johnson
Joy Global Inc.
Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Koch Industries
Kolcraft Enterprises, Inc.
Komatsu America Corp.
Kraft Foods North America, Inc.
Leviton Manufacturing Co., Inc.
Lincoln Electric Company
Magna International Inc.
Mazda (North America), Inc.
Medtronic, Inc.
Merck & Co., Inc.

Microsoft Corporation
Mitsubishi Motors North America, Inc.
Mueller Water Products
Newell Rubbermaid Inc.
Nintendo of America, Inc.
Niro Inc.
Nissan North America, Inc.
Nokia Inc.
Novartis Pharmaceuticals Corporation
PACCAR Inc.
Panasonic
Pfizer Inc.
Porsche Cars North America, Inc.
PPG Industries, Inc.
Purdue Pharma L.P.
Remington Arms Company, Inc.
Rheem Manufacturing
RJ Reynolds Tobacco Company
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Terex Corporation
Textron, Inc.
The Dow Chemical Company
The Goodyear Tire & Rubber Company
The Heil Company
The Sherwin-Williams Company
The Toro Company
The Viking Corporation
TK Holdings Inc.
Toshiba America Incorporated

Toyota Motor Sales, USA, Inc.
TRW Automotive
Vermeer Manufacturing Company
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Watts Water Technologies, Inc.
Whirlpool Corporation
Wyeth
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.